

J31VOME1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 OMEGA SA, *et al.*,

4 Plaintiffs,

5 v.

12 Civ. 6979 (PAC)

6 375 CANAL, LLC, *et al.*,

7 Defendants.

Trial

8 -----x

New York, N.Y.

March 1, 2019

9:00 a.m.

10 Before:

11 HON. PAUL A. CROTTY,

District Judge

13 -and a Jury-

14 APPEARANCES

15 WILMER CUTLER PICKERING HALE & DORR LLP

Attorneys for Plaintiffs

16 BY: ROBERT J. GUNTHER JR.

ISLEY MARKMAN GOSTIN

17 CHRISTOPHER R. NOYES

18 DENTONS U.S.LLP

Attorneys for Defendants

19 BY: STEPHEN G. DELLA FERA

-and-

20 TROUTMAN SANDERS LLP

21 BY: AVI SCHICK

22
23 Also Present: Sarah Finkel, Paralegal

Clinton Lam, Technician

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Summation - Mr. Gunther

1 (Trial resumed; jury not present)

2 THE COURT: I assume everybody is ready.

3 MR. GUNTHER: Ready for the plaintiffs, your Honor.

4 MR. SCHICK: Ready for the defendants, your Honor.

5 (Jury present)

6 THE COURT: Good morning.

7 THE JURY: Good morning.

8 THE COURT: Please be seated.

9 We're now going to have summations by the parties.

10 Plaintiffs have the burden of proof, so they go first.

11 Mr. Gunther.

12 MR. GUNTHER: Thank you, your Honor.

13 Good morning, ladies and gentlemen.

14 THE JURY: Good morning.

15 MR. GUNTHER: I want to start by thanking you. I want
16 to thank you on behalf of Omega, on behalf of the Swatch Group,
17 on behalf of myself and my colleagues who have tried this case
18 with me, Mr. Noyes and Ms. Gostin. I want to thank you on
19 behalf of Ms. Aubert, who has come here from Switzerland to be
20 with us for the trial. And I want to thank you for your
21 service. You've been here all week. You've listened intently.
22 You have done a terrific job in that respect and we thank you
23 for that.

24 And we thank you because this is an important case to
25 Omega and Swatch Group.

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Summation - Mr. Gunther

1 It's important because Omega is a major brand for
2 Swatch Group. Omega watches are sophisticated, high-end
3 products that have been precision-made in Switzerland for 170
4 years. Omega has become an iconic brand here in the United
5 States, and that brand is protected by Omega's federally
6 registered trademarks, one of which was first registered in
7 1894. It's probably one of the oldest trademarks that's still
8 on the books in the United States.

9 It's important because the sales of counterfeit Omega
10 watches in the Canal Street area have been a problem for years.
11 It's important because the Laboz brothers, who own 375 Canal
12 LLC, have allowed 375 Canal Street to be a haven of
13 counterfeiting activity for years.

14 And it's important because our case is against the
15 landlord, 375 Canal LLC. And that was deliberate. While
16 tenants come and go and subtenants come and go, the landlord
17 remains the same. And the Laboz brothers have continuously
18 owned 375 Canal Street since at least 2004.

19 And finally, this case is important because we need
20 your help. We need your help in dealing with this kind of
21 counterfeiting which everyone involved in this case recognizes
22 is wrong.

23 Now, I'd like to start by summarizing the evidence
24 that you've heard in the case.

25 So what is the evidence that you've been shown over

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Summation - Mr. Gunther

1 this past week? Much of the evidence that we brought forward
2 really isn't in dispute. As Mr. Laboz testified yesterday, 375
3 Canal Street has been owned by entities controlled by the Laboz
4 brothers since at least 19 -- sorry, since at least 2004. They
5 have been the landlord of 375 Canal Street since at least then.

6 375 Canal Street is one of some 50 buildings owned by
7 the Laboz brothers in New York City, managed by their company
8 United American Land. Half a dozen or more of the Laboz-owned
9 buildings are in the Canal Street area. And the evidence
10 showed that counterfeiting was a constant problem at 375 Canal
11 Street for years. Mr. Laboz admitted that sales of counterfeit
12 goods was a problem in general in the Canal Street area from at
13 least the period 2004 to 2012.

14 Ladies and gentlemen, we have proven that during the
15 time it has been owned by the Laboz brothers, they have allowed
16 the tenants or others operating at 375 Canal Street to
17 repeatedly sell counterfeit goods, including counterfeit Omega
18 watches.

19 And we told you about the Louis Vuitton lawsuit.
20 Louis Vuitton sued 375 Canal LLC in 2005, alleging that
21 counterfeit Louis Vuitton goods were being sold at 375 Canal
22 Street. In December 2005, 375 Canal LLC resolved that lawsuit
23 by entering into an order for a permanent injunction on
24 consent. You'll have this exhibit in the jury room; it's
25 Plaintiffs' Exhibit 138.

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Summation - Mr. Gunther

1 Pursuant to this consent injunction, 375 Canal LLC
2 was -- and now I'm quoting from the consent injunction --
3 "permanently enjoined and restrained from using, modifying,
4 disseminating, marketing, selling, offering to sell any Louis
5 Vuitton counterfeit products in any manner."

6 In paragraph 11 of that same consent injunction -- and
7 I've put that up on the screen -- 375 Canal LLC was required
8 for a period of two years to hire a private investigator -- and
9 I'm quoting from paragraph 11 of the consent injunction -- to,
10 quote, inspect, investigate, and conduct searches of all areas
11 of each of the properties, one of which was 375 Canal Street,
12 on a weekly basis for a period of two years.

13 And we brought in evidence and brought the evidence
14 before you of the three lawsuits brought against 375 Canal LLC
15 by the City of New York. In 2005 they were sued by the City of
16 New York, 2006, and 2009.

17 375 Canal LLC settled every one of those three cases.
18 And in each one the Laboz brothers agreed that the premises
19 were enjoined, permanently enjoined -- forever -- from the sale
20 or possession of counterfeit merchandise. Those stipulated
21 settlements -- which will again be in the jury room for you to
22 inspect -- are Plaintiffs' Exhibit 137, Plaintiffs' Exhibit
23 140, and Plaintiffs' Exhibit 147.

24 The August 2009 stipulation, the one that settled a
25 third of the lawsuits, Plaintiffs' Exhibit 147, also provided

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Summation - Mr. Gunther

1 in paragraph 8 -- and I have that up on the screen -- that, and
2 I'm quoting: "375 Canal or the subsequent tenant shall
3 dismantle and remove all hidden storage facilities, structures
4 inside the premises to allow open access to all areas within
5 the storefront."

6 That same stipulation of settlement also contained a
7 requirement in paragraph 12, and I put that up on the screen,
8 that, and I'm quoting: "375 Canal shall have professional
9 course of conduct signs posted throughout the premises. Said
10 signs shall inform patrons that the sale and/or possession of
11 either pirated or trademark counterfeit merchandise will not be
12 tolerated and may result in their arrest. Signs shall be
13 visible at all times and are to be posted on or before August
14 15th, 2009."

15 And we brought in evidence regarding, following those
16 lawsuits, the lease to T.A. Discount. And the lease to T.A.
17 Discount occurred in July of 2009, one month after -- excuse
18 me, August of 2009, one month after the 2009 stipulation of
19 settlement with the City of New York.

20 The lease contains a provision prohibiting sales of
21 counterfeit goods, but there's no requirement for signs that
22 counterfeiting is a crime. There's no requirement that storage
23 or hidden areas must be dismantled. There's no provision for
24 monitoring the property to detect the sale, whether there's
25 sales of counterfeit goods. The lease contained none of these

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Summation - Mr. Gunther

1 provisions, despite the fact that the settlement of the Louis
2 Vuitton case required a monitor for two years.

3 And you heard Mr. Laboz testify that after those two
4 years ran out, he dropped the private investigator that was
5 monitoring 375 Canal, and he did not have any private
6 investigator monitoring the property after that, after 2007.
7 After that, the only monitoring that you heard was Mr. Laboz or
8 his brothers occasionally walking by or walking in the
9 property. That was the extent of it. And that type of
10 occasional walk-by or walk-in was plainly not sufficient.

11 You heard Mr. Laboz admit that most counterfeit
12 merchandise is not out in the open in the store; he admitted
13 that's not how it works. The T.A. Discount lease contained
14 none of these provisions, even though the 2009 settlement of
15 the third case brought by New York City required posting of
16 signs at 375 Canal saying counterfeiting is a crime, and
17 dismantling any storage or hidden rooms.

18 And the evidence showed that in December of 2010, when
19 Investigator Brad Cole accompanied the New York Police
20 Department Peddler's Task Force to the raid on Canal Street, he
21 took pictures of the storefront at 375 Canal Street.

22 And what did that show? We showed these to him during
23 his cross-examination, Mr. Laboz. No signs. We showed him
24 both PX 106 and 107. And we showed him PX 107 and showed him
25 that, in fact, there was still a door to a back hidden

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Summation - Mr. Gunther

1 storeroom. And we showed that and we've pointed out both the
2 door and the latch. That was in 2010, not long after they had
3 agreed to dismantle all of that stuff in the back and put up
4 signs.

5 And sales of counterfeit products continued at 375
6 Canal Street. You heard the testimony from Mr. Taute, the
7 former member of the New York Police Department Peddler's Task
8 Force, and Private Investigator Brad Cole, that in December
9 2010, the New York Police Department conducted an enforcement
10 action in the Canal Street area during which at least one
11 counterfeit Omega watch was seized from 375 Canal Street,
12 numerous other counterfeit Omega watches were seized from other
13 locations, retail locations, on the Canal Street area.

14 And we showed you the April 2011 notice to 375 Canal
15 LLC about sales of counterfeit Chanel jewelry that were taking
16 place at 375 Canal Street. That's Plaintiffs' Exhibit 87.

17 And then we showed you the September 28th, 2011 letter
18 from Omega's lawyer, Mr. Lindenbaum, to Albert Laboz regarding
19 sales of counterfeit Omega and Swatch watches at 375 Canal.
20 That letter will be in evidence and you can inspect it; it's
21 Plaintiffs' Exhibit 90.

22 And Ms. Tritto, who was the lawyer for 375 Canal LLC,
23 admitted -- and this is in Plaintiffs' Exhibit 91 -- that there
24 was apparent selling of counterfeit goods bearing your -- that
25 is, Omega's -- client's trademarks at 375 Canal. She said the

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Summation - Mr. Gunther

1 offending subtenant was removed. But the tenant, T.A.
2 Discount, was not removed and the counterfeiting continued.

3 And then we brought evidence in of the May 19, 2012
4 investigation, the purchase of the counterfeit Omega watch at
5 375 Canal Street. The investigators for Omega looked at two
6 counterfeit Omega watches that were brought by the clerk from
7 the back storeroom. They bought one; it was sold in a plastic
8 Ziploc bag for \$80. No packaging, no box, no manual, no
9 warranty cards. \$80 price, despite the fact that genuine Omega
10 watches sell for thousands of dollars. And there's still, in
11 2012, no signs at 375 Canal Street saying counterfeiting is a
12 crime. The back storeroom is still there, and that is where
13 the clerk goes to get the counterfeit Omega watches.

14 Now, our burden was to prove by a preponderance of the
15 evidence the purchase of this counterfeit Omega watch. That
16 means that to prevail, we just have to make the scales tip a
17 little bit in our favor, slightly in our favor.

18 I submit to you that we proved the purchase of that
19 watch by far more than a preponderance of the evidence. We
20 called Leslie Quinonez, now a teacher; she came in here from
21 Denver to testify. She was the investigator that day who
22 purchased each of the watches during the investigation when she
23 purchased the watch at 375 Canal Street. We showed you the
24 video that she took of the sale. She noted from the video that
25 the purchased watch has a smooth surface around the outside

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Summation - Mr. Gunther

1 face of the watch. She testified that it was six watches that
2 she purchased that day on May 19th, 2012. The only watch
3 without markings around the face was the one that she bought at
4 375 Canal Street.

5 And we called Brad Cole, the private investigator who
6 ran the investigation. We showed you the two videos that he
7 took of the purchase of the watch at 375 Canal Street. And we
8 put into evidence -- and you'll have it in the jury room -- his
9 report, Plaintiffs' Exhibit 240A, the full report that he
10 prepared on May 23rd, 2012, just days after the May 19, 2012
11 investigation. It has all the attachments in it. You'll be
12 able to look at those.

13 Both Ms. Quinonez and Mr. Cole explained to you how,
14 after the purchase of the watch, which was given to her by the
15 clerk in a black plastic bag, she took a yellow Post-It note,
16 wrote "375" on it, and put it in the bag with the watch and
17 tied it closed. Both Ms. Quinonez and Mr. Cole testified that
18 she purchased six watches that day from six different locations
19 in the Canal Street area; and that she placed a yellow Post-It
20 note with the store number in the bag of each one of those
21 watches to keep everything in order. And their testimony is
22 corroborated by Mr. Cole's May 23rd, 2012 report, Exhibit 240A,
23 which says precisely the same thing.

24 Mr. Cole further testified that he took -- within days
25 after the purchase, took separate photos of each of the

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Summation - Mr. Gunther

1 watches, along with the yellow Post-It notes and the bags they
2 were sold with, and attached each photo to his report. And
3 that will be in the jury room with you. You can look at those
4 attachments.

5 Attachment 21 to Mr. Cole's report, which is also in
6 evidence as Plaintiffs' Exhibit 104, is the photo of the
7 counterfeit Omega watch purchased at 375 Canal Street on May
8 19, 2012, along with the yellow Post-It note on which
9 Ms. Quinonez wrote "375," and the small plastic Ziploc bag
10 which the watch was sold in.

11 And we showed you PX 100 -- we passed it around to
12 you. It will be in the jury room. You can look at it
13 further -- which both Ms. Quinonez, Mr. Cole and Mr. Foster all
14 testified was the actual counterfeit Omega watch purchased on
15 May 19, 2012 at 375 Canal Street. Ms. Quinonez and Mr. Cole
16 explained that they both believed the watch was counterfeit
17 because of the \$80 purchase price, the lack of a box or any
18 packaging, and the circumstances of the sale: The souvenir
19 shop on Canal Street.

20 And Mr. Foster, with decades of experience assessing
21 real versus counterfeit watches, explained all of the reasons
22 why he was immediately able to tell upon inspecting the watch
23 that it was a counterfeit.

24 That was the evidence that we presented to you over
25 this past week.

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Summation - Mr. Gunther

1 And our claim, as we said, is against the landlord,
2 375 Canal LLC, the owner of 375 Canal Street. And our claim
3 against 375 Canal LLC is that they are liable for contributory
4 trademark infringement.

5 And what I'd like to do now is briefly summarize the
6 elements of that claim, which the judge will instruct you on,
7 and explain how the evidence shows that we have proven each
8 element of contributory trademark infringement.

9 The Court will instruct you that in order to establish
10 our claim for direct -- that we first have to show direct
11 infringe as part of it. And this will be on the jury verdict
12 form as well. The Court will instruct you that in order to
13 establish our claims for direct trademark infringement, we must
14 prove by a preponderance of the evidence the following:

15 One, goods were sold or offered for sale from 375
16 Canal Street by one or more tenant, subtenant or occupant at
17 375 Canal Street; two, that those goods contained the words,
18 symbol, or designation that; three, to an average observer was
19 likely to cause confusion, to cause mistake or to deceive as to
20 the source, origin, affiliation, approval or sponsorship of the
21 goods.

22 That's trademark infringement.

23 The Court will also instruct you that counterfeit
24 marks by their very nature cause confusion. So if you find
25 that the goods sold or offered for sale from 375 Canal Street

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Summation - Mr. Gunther

1 contained counterfeit marks, in other words, a word or symbol
2 or other designation that to an average observer was identical
3 to or substantially indistinguishable from Omega's trademarks,
4 then you don't need to separately determine whether there's a
5 likelihood of confusion if it's a counterfeit, if that's what
6 you conclude.

7 Now, we have proven -- and I think we've proven by far
8 more than a preponderance of the evidence, that counterfeit
9 watches, Omega watches, were offered for sale at 375 Canal
10 Street.

11 You heard from Leslie Quinonez, you heard from Brad
12 Cole about the counterfeit Omega watches that were offered for
13 sale to Ms. Quinonez at 375 Canal Street on May 19, 2012.
14 Everything that they told you from that witness stand was
15 backed up by documents, it was backed up by videos, it was
16 backed up by photographs. And the watches offered for sale at
17 375 Canal contained identical versions of Omega's trademarks.
18 The watches offered for sale from 375 Canal with Omega
19 trademarks were counterfeits; they weren't genuine Omega
20 watches.

21 Plaintiffs' Exhibit 100 is not a genuine Omega watch;
22 it's counterfeit. Mr. Foster gave you many reasons; he
23 explained that to you. To name a few, there's no such thing as
24 a Seamaster Broad Arrow; that's what's on the back of the
25 watch. There's no eight-digit engraved serial number on this

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Summation - Mr. Gunther

1 watch, but everybody Omega watch has one. There's no water
2 resistance indication. Every Omega Seamaster watch has a water
3 resistance indication.

4 He pointed to the foldover hinge clasp on this watch
5 which is not used by Omega. And he pointed to the green hour
6 markings on this watch instead of the yellow/yellowish-white
7 luminescent material which he explained to you was something
8 called Super Lumi-Nova.

9 Now, he also looked and determined that the watch that
10 he showed to you, which is Plaintiffs' Exhibit 9, and which you
11 will have in the jury room as well, is the closest genuine
12 Omega watch to Plaintiffs' Exhibit 100. You can compare them
13 in the jury room.

14 The watch offered for sale in PX 108A -- remember,
15 this is the one that was offered for sale; we're showing it to
16 you on the screen. They actually purchased the other watch --
17 that was not a genuine Omega watch either. Mr. Foster
18 explained that there is no genuine Omega watch with those
19 features, that is, a white face, white dials, and a black
20 bezel, which is the ring around the outside. No genuine Omega
21 Speedmaster watch has days of the week like that one does.

22 But you really don't even need Mr. Foster. I don't
23 mean to denigrate him. He's clearly an expert. But you really
24 don't need Mr. Foster to tell you. All you need to do is use
25 your common sense. The watch had blue tape on it, it was sold

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Summation - Mr. Gunther

1 in a Ziploc bag, it was sold with no box or instruction manual,
2 it was kept in a back room, sold for \$80 at a Canal Street
3 souvenir shop.

4 And there is no doubt, members of the jury, that the
5 watch in my hand, PX 100, is the same watch that Ms. Quinonez
6 purchased at 375 Canal Street on May 19th, 2012.

7 We put up a slide that shows three things. It shows
8 the watch in the video. And you can see the watch on
9 Mr. Porco's arm, and you can see the smooth bezel around the
10 outside of the face. You can also see what is marked as
11 Plaintiffs' Exhibit 104, the photograph of the watch that
12 Mr. Cole took to attach to his May 23rd, 2012 report.
13 Mr. Cole, Ms. Quinonez both testified that the watch that she
14 purchased on May 19th, 2012, was this watch, Plaintiffs'
15 Exhibit 100.

16 Mr. Foster compared the watch, the actual watch in
17 Plaintiffs' Exhibit 100, to the watch in Mr. Cole's photo,
18 Plaintiffs' Exhibit 104, and he confirmed and explained to you
19 the reasons why it's the same watch. Look with your own eyes.
20 Look at those three things. There's no difference.

21 In short, we have proven direct infringement: The
22 offer for sale and sale of counterfeit Omega watches at 375
23 Canal Street.

24 Now I want to go on to contributory infringement,
25 which is the part that we're going after the landlord for.

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Summation - Mr. Gunther

1 The Court will instruct you that in order to establish
2 our claim for contributory trademark infringement, plaintiffs
3 must prove by a preponderance of the evidence, making it
4 slightly tip in our favor, the following four things:

5 One. Whether defendant possessed -- and this is 375
6 Canal LLC. Whether defendant possessed the power and authority
7 to exercise control over the use of the premises at 375 Canal
8 Street for selling or offering for sale merchandise that
9 infringed Omega's trademarks, power and authority. Control.

10 Two. Whether defendant knew or had reason to know
11 that merchandise that infringed Omega's trademarks was being
12 sold or offered for sale at 375 Canal Street.

13 Three. Whether defendant continued to lease its
14 premises at 375 Canal Street even after it knew or had reason
15 to know that the premises were being used as a place from which
16 merchandise that infringed Omega's trademarks was sold or
17 offered for sale.

18 And then finally, four, whether defendant took
19 reasonable remedial steps to try to stop the sale or offer for
20 sale of merchandise that infringed Omega's trademarks at 375
21 Canal Street.

22 Let me take those one-by-one.

23 The first one is control.

24 We presented evidence that 375 Canal Street is the
25 owner and landlord of 375 -- sorry, 375 LLC, excuse me, is the

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Summation - Mr. Gunther

1 owner and landlord of 375 Canal Street. Its lease with T.A.
2 Discounts, which is in evidence as Plaintiffs' Exhibit 206 and
3 will be before you in the jury room, in section 13, that lease
4 gave 375 Canal LLC the right to inspect the premises at any
5 time. Section 45 of the lease said that T.A. Discount could
6 only operate as a perfume store. You saw the evidence of what
7 they were doing there.

8 It also said that they could not sell counterfeit
9 goods. And it gave 375 Canal LLC the right to immediately,
10 immediately obtain possession of the premises if any of these
11 provisions was violated. In section 8 of that lease said that
12 the tenant who had signed the lease, T.A. Discounts, was liable
13 for the actions or omissions of any subtenant.

14 Control. We proved control in spades.

15 Knowledge. What was the evidence on their knowledge
16 of counterfeiting activity with respect to Omega and generally?

17 Defendants knew that their premises were being used as
18 a haven for counterfeiting activity: The three settlements
19 with the City of New York; a dozen notices that Ms. Caponegro
20 Silvey testified about from her law firm, including Plaintiffs'
21 Exhibit 19, 23, 44, 47, 79, and 87; the lawsuit from Louis
22 Vuitton and that settlement; and even after the consent
23 injunction where they permanently agreed no more counterfeiting
24 activity at 375, further notice of counterfeiting of Louis
25 Vuitton products at 375 Canal Street, that's Plaintiffs'

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Summation - Mr. Gunther

1 Exhibit 164.

2 Defendant had specific knowledge that they were
3 being -- that 375 Canal was being used to sell counterfeit
4 Omega goods. We showed you Plaintiffs' Exhibit 90, the
5 September 28, 2011 notice letter from Mr. Lindenbaum that
6 Mr. Laboz and his in-house lawyer, Ms. Goodman and Ms. Tritto,
7 all reviewed. That letter specifically informed the defendants
8 of the counterfeiting arrests at 375 Canal in December 2010 and
9 in 2011. Ms. Tritto's email response, Exhibit 91, even admits
10 that an occupant of 375 Canal Street was apparently selling
11 counterfeit goods bearing your client's -- Omega's --
12 trademarks.

13 The element of their continuing to supply services,
14 continuing to supply the space after notice. The defendant 375
15 Canal LLC had notice since at least -- we believe before, but
16 at least September 2011. And it continued to lease the
17 premises to the same tenant, T.A. Discount Store, in May 2012,
18 when Leslie Quinonez bought the watch, the counterfeit Omega
19 watch.

20 The defendant showed you documents from attempts to
21 other tenants, but defendant did not show you a single document
22 between September 29, 2011, the date of the notice letter,
23 until after this lawsuit was filed in September 2012 of an
24 effort to try to do anything about T.A. Discount. We know that
25 T.A. Discount, the tenant, was still there until November 2012.

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Summation - Mr. Gunther

1 And that's apparent from Plaintiffs' Exhibit 206 and 227, both
2 of which will be in the jury room with you.

3 The defendant showed you court documents from attempts
4 to remove other tenants, but nothing about T.A. Discount or any
5 subtenant between September 2011, when they certainly had
6 notice of counterfeiting of Omega goods, Omega watches, and May
7 2012, when Leslie Quinonez purchased the watch.

8 Finally, lack of reasonable remedial steps.

9 We know there was continued counterfeiting after
10 defendant was on notice, because Leslie Quinonez was offered
11 two counterfeit watches at 375 Canal Street on May 19, 2012.
12 And we know, because we heard him testify, that Mr. Laboz said
13 he only walked by or occasionally went inside the store at 375
14 Canal, never asked for counterfeit merchandise, he never made
15 any effort to see whether there was counterfeit merchandise in
16 the back storeroom.

17 But we know from Ms. Quinonez's video -- and that's
18 Plaintiffs' Exhibit 108A -- and from the notice from
19 Ms. Silvey's firm sent to 375 Canal LLC, like Plaintiffs'
20 Exhibit 87, that counterfeit goods weren't kept out in the
21 open. Indeed Mr. Laboz testified that he knew -- that he
22 knew -- that counterfeit merchandise is not obviously displayed
23 and is not sold front and center in a souvenir shop.

24 375 Canal LLC didn't just negligent to take remedial
25 steps, it didn't take the steps it was required to do by law

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Summation - Mr. Gunther

1 under its stipulation of settlement with the City of New York,
2 the one that settled the 2009 lawsuit.

3 There was testimony that they did remove the hidden
4 storeroom; but you saw the photos Mr. Cole took in 2010, in
5 December 2010. It was there. And they didn't do that despite
6 the fact that Mr. Laboz acknowledged it would have been
7 inexpensive to require them to remove that storeroom.

8 375 Canal LLC did not put up any warning signs,
9 despite the fact that Mr. Laboz admitted that it would have
10 been really inexpensive to put up those signs. It didn't do
11 anything serious to monitor the property to ensure that there
12 were no sales of counterfeit goods. The Laboz brothers dropped
13 the private investigator after the Louis Vuitton two-year
14 agreement ended, and that was it. And Mr. Laboz admitted that
15 hiring a private investigator would not have been that
16 expensive. In fact, he admitted that each of these basic
17 remedial measures would have cost far less than a lawsuit to
18 remove a tenant; and yet he and his brothers failed to
19 implement any of them.

20 Mr. Laboz admitted that in 2006, when they signed the
21 agreement with the City of New York on the second lawsuit, he
22 admitted that he agreed to do -- and this is a quote from his
23 testimony -- everything in his power to stop counterfeiting at
24 375 Canal Street. But plainly he did not.

25 In sum, we have proven each of the four elements of

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Summation - Mr. Gunther

1 contributory trademark infringement: Control, knowledge,
2 continued supply of the leased space to the tenant, and lack of
3 reasonable remedial measures.

4 Now I want to turn to the question of damages,
5 statutory damages.

6 On the issue of statutory damages, the Court will
7 instruct you as follows:

8 If you find that 375 Canal LLC is liable for
9 contributory trademark infringement, then you must determine
10 Omega's damages.

11 Omega seeks what is known as an award of statutory
12 damages. The purpose of statutory damages is to compensate the
13 trademark owner, penalize the defendant, and deter future
14 trademark counterfeiting. That's all in the instruction the
15 judge will read to you.

16 Defendant made a big deal about Omega seeking damages.
17 They mentioned the number \$8 million several times. But what
18 they didn't tell you is that the amount of damages that we can
19 receive, that Omega can receive in terms of the ranges, is set
20 by law. We didn't pick those numbers out of thin air.

21 Section 35(c) of the Trademark Act established by
22 Congress provides that -- and I'm quoting -- "Plaintiff may
23 elect to recover an award of statutory damages in the amount of
24 not less than 1,000 or more than 200,000 per counterfeit mark
25 for type of goods sold offered for sale or distributed."

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Summation - Mr. Gunther

1 The Trademark Act goes on to say that if you find
2 375 -- that the conduct was willful, you may award statutory
3 damages of up to \$2 million per counterfeit mark -- that's in
4 the statute; we didn't make that up -- for type of goods sold,
5 offered for sale or distributed.

6 The Court will instruct you this to effect.

7 So what does that mean?

8 There's only one type of goods here: Watches. We
9 have four federally registered trademarks. The first one is
10 Plaintiffs' Exhibit 3. You'll have all of our federally
11 registered trademarks in the jury room.

12 Plaintiffs' Exhibit 3 is the Omega symbol and it goes
13 back -- this is the one that goes back all the way to 1894.
14 And you can see I've highlighted, it says, Omega, the word,
15 Omega may be omitted without materially altering the character
16 of our trademark, the essential feature of which is the Greek
17 letter. And then there is the symbol for "Omega."

18 And you can see -- and we've put on the slide Exhibit
19 100, there's three views of Exhibit 100 on the bottom, and
20 you'll be able to see it in the jury room, you'll have it --
21 that there is an Omega symbol on the face of the watch, there
22 is an Omega symbol on the top of the winder, there is an Omega
23 symbol on the back of the clasp, and there is an Omega symbol
24 on the back case. All of them are circled.

25 The watch that was offered for sale but which

J31VOME1

Summation - Mr. Gunther

1 Ms. Quinonez did not buy, and I've got the screenshot of that
2 up on the top right, has the Omega mark. You can see that.
3 Just the Omega, the symbol. So each one of the two watches has
4 that symbol.

5 Plaintiffs' Exhibit 4 is our second federally
6 registered trademark. And that's the Omega symbol and word
7 "Omega" together. This mark was first registered in 1953. And
8 we've put up on the screen the two views of Plaintiffs' Exhibit
9 100 that show the Omega symbol with the "Omega" word on the
10 watch face and on the back of the watch, on the clasp. And
11 we've shown also up in the right-hand corner from Plaintiffs'
12 Exhibit 108A, and this is at -- just to be very precise, at
13 seven minutes, 29 seconds, 13-hundredths of a second -- we are,
14 after all, Omega; we do the timing for the Olympics -- you can
15 see the Omega symbol and the Omega word. So that federally
16 registered trademark is used on both of those products.

17 And we can put up Plaintiffs' Exhibit 5. That's the
18 "Omega" word alone. That was also registered -- that was
19 registered first in 1952. And we've shown you Omega, that
20 mark, that trademark appearing on the face of the counterfeit
21 watch in Plaintiffs' Exhibit 100 and on the back, on the clasp.
22 And on the watch that was offered for sale, which they did not
23 purchase, the word "Omega" also appears on the face of the
24 watch. Both of those watches contain that mark.

25 And then finally, Plaintiffs' Exhibit 6 is Omega's

J31VOME1

Summation - Mr. Gunther

1 Seamaster mark, first registered, again, in 1952. And we've
2 shown the counterfeit watch, Exhibit 100. The face has the
3 word "Seamaster" written on it, and it has the word "Seamaster"
4 on the back.

5 Now, defendant has tried to suggest that the
6 trademarks are all the same. They are not. Each trademark is
7 individually registered with the United States Patent and
8 Trademark Office. Each has a separate registration number.
9 You can look at the four registrations; they are in evidence.
10 Each trademark is Omega's property branded to Omega by the
11 United States Government. Each trademark can be enforced
12 against the defendant in this case.

13 Omega is entitled to damages for infringement of each
14 of those four registered trademarks. We are entitled to
15 statutory damages for the infringement of Plaintiffs' Exhibit
16 3, Plaintiffs' Exhibit 4, Plaintiffs' Exhibit 5, and
17 Plaintiffs' Exhibit 6, because counterfeit versions of each of
18 those registered trademarks are on PX 100, and several of those
19 trademarks on the watch that was offered for sale. And that's
20 up to \$200,000 for each of the four trademarks, so up to
21 800,000 in total, and up to two million per mark -- remember,
22 that's what the statute says; that's what Congress passed --
23 for eight million in total.

24 So how do you determine the amount to award? Well,
25 the judge is going to give you guidance on that. And you'll

J31VOME1

Summation - Mr. Gunther

1 hear from the judge that in determining the amount of statutory
2 damages, you may select an amount as you consider just, based
3 on the facts and circumstances of this case. So it's up to
4 you, members of the jury, to select a number from the required
5 ranges, a number that you consider just. The judge will
6 instruct you that you can consider a number of factors in
7 making that assessment.

8 I'm going to focus on a couple of them now.

9 One is the value of the trademark. It's undisputed
10 that these trademarks are highly valuable. The Omega mark that
11 I showed you first has been used for Omega watches since 1894.
12 It's undisputed that these four trademarks have come to
13 symbolize and identify the Omega brand, an iconic brand that is
14 world renowned.

15 And importantly for this case, another factor the
16 judge will tell you you can consider in assessing the amount of
17 damages is the potential for discouraging the defendant.
18 Ladies and gentlemen of the jury, that's exactly what's needed
19 here. We need your help to send a message to 375 Canal LLC and
20 its owners, the Laboz brothers.

21 Mr. Laboz agreed that between at least 2004 and 2012,
22 sales of counterfeit goods was a problem in the Canal Street
23 area. But respectfully, I submit to you Mr. Laboz still
24 doesn't get it. He still chooses to ignore the problem.
25 Despite getting all the notices, despite getting sued multiple

J31VOME1

Summation - Mr. Gunther

1 times, he testified in front of you that he had no reason to
2 believe there was any counterfeiting activity. Despite telling
3 the City of New York he'd removed hidden storerooms and that he
4 put up a sign or signs, you saw the photos, you saw the videos,
5 375 Canal didn't have any signs in 2010, didn't have any signs
6 in 2012. What did it have in 2010? It had a hidden storeroom.
7 And what did it have in 2012? It had the same hidden
8 storeroom. And Mr. Laboz admitted that he never inspected the
9 hidden areas. His excuse for that was, "Tenants don't like
10 that." That was his excuse.

11 So when awarding damages, we ask that you award an
12 amount that will get this defendant, the Laboz brothers, to pay
13 attention; an amount that will discourage the Laboz brothers
14 from making those kinds of excuses, from looking the other way;
15 an amount that will encourage them to do the right thing.

16 Another important factor you may consider in assessing
17 the amount of damage -- and the judge will instruct you -- is
18 "the deterrent effect on others besides the defendant." It's
19 not just about 375 Canal LLC in this case; it's about deterring
20 others, other landlords, including the Laboz brothers
21 themselves who own many other buildings in the city, and own
22 buildings -- at least half a dozen or more buildings -- in the
23 Canal Street area.

24 Mr. Laboz testified that out of the 50 buildings that
25 he and his brothers own, most of them have retail space. Some

J31VOME1

Summation - Mr. Gunther

1 are still souvenir shops, selling watches, jewelry, T-shirts.
2 He's still collecting rent from those shops. And he has vacant
3 shops. Mr. Laboz testified that if a tenant wanted to pay
4 money, he'd rent it to them.

5 And the counterfeiting problem is still very much a
6 problem. It hasn't stopped. You heard from Mr. Foster that he
7 works continually with United States Customs to help identify
8 counterfeit watches.

9 I submit to you that sending a message here to this
10 defendant, to the Laboz brothers, will deter others as well,
11 will deter them from looking the other way, from doing the bare
12 minimum and, instead, hopefully get landlords to begin to take
13 responsibility for their properties, to stop permitting
14 counterfeiting activity to take place on their premises.

15 And finally, in assessing the amount of damages, the
16 judge will tell you that one thing you may consider is whether
17 the defendant's conduct was innocent or whether it was willful.
18 I submit to you that we have proven in this case that the
19 defendant's conduct was willful.

20 The Court will instruct you that to prove willfulness,
21 Omega must show, one, that 375 Canal LLC was actually aware of
22 the infringing activity; or two, that 375 Canal LLC's actions
23 were the result of reckless disregard or willful blindness.

24 We submit to you that we have proven that the
25 defendants acted with reckless disregard and willful blindness

J31VOME1

Summation - Mr. Gunther

1 concerning the trademark counterfeiting going on at 375 Canal
2 Street.

3 What did the evidence show in that regard?

4 They leased 375B Canal Street to T.A. Discount in July
5 2009, just a month after agreeing to dismantle all storage
6 areas. In December 2010 they get raided, Omega watches are
7 confiscated, and there were hidden storage areas.

8 In September 2011, Omega sends 375 Canal the notice
9 letter telling them about the raids and about the ongoing Omega
10 counterfeiting. Nothing happens. They don't ask whether the
11 tenant is selling counterfeit goods, they don't inspect the
12 hidden areas, they don't hire an investigator, they don't even
13 put up signs. They do nothing.

14 So what happens?

15 In May 2012, counterfeit Omega watches were available
16 at 375 Canal Street. Ladies and gentlemen, I submit to you
17 that is reckless disregard.

18 Mr. Laboz's testimony confirmed that he was willfully
19 blind to the counterfeiting at 375 Canal Street. He was
20 ignoring the problem, not paying attention. Mr. Laboz
21 testified he didn't even know the police raided 375 Canal, his
22 own property, in December of 2010. And despite all of the
23 counterfeiting activity that we submitted to you that's shown
24 on this timeline for years and years, he testified to you that
25 he had no reason to believe there was counterfeiting at 375

J31VOME1

Summation - Mr. Gunther

1 Canal Street. I submit to you he had every reason to believe
2 it, he just chose to ignore it.

3 So when you consider the value of the Omega
4 trademarks, the potential for discouraging this defendant, and
5 deterring others, other landlords, we ask you to award
6 statutory damages of at least 200,000 for each of the four
7 infringements of our trademarks. But we also ask you,
8 considering defendant's reckless disregard and willful
9 blindness -- which we've proven to you -- to award two million
10 to Omega for each of those four trademark infringements; that's
11 a total of \$8 million. And you heard Mr. Schick say that's a
12 lot of money. I agree with him. In terms of deterring this
13 defendant and deterring others, we believe that is just and we
14 ask you to consider that a just award.

15 So in response to all of the evidence we've presented
16 demonstrating that 375 Canal LLC is liable for contributory
17 infringement, what have we heard in response from the
18 defendant?

19 What we've heard is a litany of excuses in efforts to
20 point fingers at others, rather than taking responsibility for
21 their own conduct. Defendants said that it's Omega's fault --
22 they told us it was our fault because we took too long to
23 notify them of counterfeiting and not providing specific
24 evidence. But the defendant got notice of counterfeiting
25 activity at 375 Canal Street again and again and again.

J31VOME1

Summation - Mr. Gunther

1 You heard Ms. Tritto. She testified that it's too
2 difficult and it takes too long to evict a tenant after a
3 counterfeiting notice. But you've also seen and we've shown
4 you paragraph 25 of the T.A. Discount lease. That lease
5 clearly states -- and this is Plaintiffs' Exhibit 206 at
6 paragraph 35 -- that 375 Canal could have immediately,
7 immediately terminated the lease should there be counterfeiting
8 on the premises.

9 Now, defendant tries to argue that they asked the
10 tenant to remove the subtenant. But did they?

11 Ms. Tritto said on Wednesday, she testified that --
12 and I'm quoting here -- she would have told the tenant that
13 they needed to deal with this immediately. She said "I would
14 have." But she didn't have -- when Ms. Gostin asked her the
15 question, she didn't have a specific recollection of what she
16 actually did. Whether she did anything or not, we don't know.
17 But what we do know is that according to the lease, the tenant
18 was responsible for the actions of the subtenant. That's
19 paragraph 8 of Exhibit 208.

20 And if there was counterfeiting going on by a
21 subtenant, the tenant should have had the subtenant removed.
22 And leaving the tenant aside, do we have evidence that the
23 subtenant was actually removed? No, we don't. The truth is
24 the tenant was not removed from 375 Canal Street when
25 Ms. Tritto responded to Omega's notice letter in October of

J31VOME1

Summation - Mr. Gunther

1 2011. The tenant was not removed when Ms. Quinonez and
2 Mr. Cole conducted the undercover operation on May 19, 2012.
3 And the tenant was not removed from 375 Canal Street when this
4 lawsuit was filed in September 2012. No attempt was made to
5 get rid of this tenant until after we brought this lawsuit.

6 You heard a number of times about that this is a case
7 about so-called failed buys, and how could 375 Canal LLC be
8 expected to know that there was counterfeiting at the location
9 when plaintiffs' investigators didn't buy a watch in 2011 or
10 2012.

11 Ladies and gentlemen, that's just another excuse.

12 You heard evidence from Mr. Cole that a lot of that
13 work was canvassing operations, where they would look, but not
14 buy. And in addition to that, it's a red herring for this
15 reason: Defendant had actual knowledge of ongoing
16 counterfeiting activity at 375 Canal Street for years, not just
17 through Omega's letter of September 2011 regarding the New York
18 Police Department raids, not just because of the three New York
19 City lawsuits, not just because of Louis Vuitton litigation,
20 and not just because of the numerous notices sent by several
21 different brand holders.

22 Finally, let's think one more time about defendant's
23 excuses concerning the watch that is Plaintiffs' Exhibit 100.

24 Despite the testimony of Ms. Quinonez and Mr. Cole and
25 Mr. Foster, defendant still will not admit that Plaintiffs'

J31VOME1

Summation - Mr. Gunther

1 Exhibit 100 is a counterfeit Omega watch or that Plaintiffs'
2 Exhibit 100 is the same counterfeit Omega watch that was
3 purchased by Ms. Quinonez on May 19, 2012 at 375 Canal Street.
4 I submit to you the evidence is crystal clear that it is. You
5 heard the testimony. You saw the videos. You saw the photos.
6 You've seen the watch.

7 And you'll have Plaintiffs' Exhibit 240A, Mr. Cole's
8 report, May 23, 2012, days after the investigation, which
9 documents everything, including the photographs he took at the
10 time. A picture is worth a thousand words. Plaintiffs'
11 Exhibit 100 is the watch that Ms. Quinonez purchased from 375
12 Canal Street.

13 But despite all this evidence, defendant asked you to
14 speculate that maybe the watches somehow got mixed up. There's
15 simply no evidence to support that assertion.

16 Defendant's continuing denial in the face of
17 overwhelming evidence that Plaintiffs' 100 is a counterfeit
18 Omega watch, and that it's the same watch that was purchased by
19 Ms. Quinonez at 375 Canal Street on May 19, 2012, is consistent
20 with the approach it has taken in failing to take steps and
21 repeated steps to do anything reasonable with respect to
22 ameliorating counterfeiting activity at 375 Canal Street.

23 375 Canal and the Laboz brothers never take
24 responsibility. They only offer excuses; they only offer to
25 blame others. And that's not right.

J31VOME1

Summation - Mr. Schick

1 I'm going to sit down and you're going to hear from
2 Mr. Schick. But I'm going to have one last chance to address
3 you briefly before you begin your deliberations.

4 Thank you very much for your attention this week and
5 this morning.

6 THE COURT: We'll take a short recess, and then we'll
7 hear from Mr. Schick.

8 (Jury not present)

9 THE COURT: We'll resume at five after.

10 MR. GUNTHER: Thank you, your Honor.

11 MR. SCHICK: Thank you, your Honor.

12 (Recess)

13 (Jury present)

14 THE COURT: Mr. Schick.

15 MR. SCHICK: Yes, your Honor. Thank you.

16 Good morning.

17 THE JURY: Good morning.

18 MR. SCHICK: Thank you for your service today and the
19 entire week.

20 When I stood before you right here on Monday morning,
21 I told you that this week we will hear very, very little about
22 counterfeiting of Omega goods. As I stand here now, that
23 remains true.

24 When I stood before you on Monday morning, I told you
25 that you will see Omega investigative reports that show there

J31VOME1

Summation - Mr. Schick

1 was no Omega merchandise at 375 Canal Street between the
2 September 28, 2011 letter from Mr. Lindenbaum and the May 19,
3 2012 purchase. As I stand here now, that also is true.

4 When I stood before you on Monday morning, I told you
5 there will be no evidence or testimony that anyone associated
6 with the defendant, 375 Canal LLC, was ever even accused of
7 being involved with the sale of counterfeit goods of any type,
8 let alone Omega goods. As I stand here now, that remains true.

9 When I stood before you on Monday morning, I told you
10 that you will see that 375 Canal LLC worked with local
11 merchants when they can because they had a soft spot for them
12 and because Laboz's father got a start there and wanted it that
13 way. As I stand here now, that's still true.

14 When I stood before you on Monday morning, I told you
15 that you will see that Omega's investigations and investigators
16 were sloppy. They submitted false declarations in this case.
17 As I stand here now, that's true.

18 As I stood before you on Monday morning, I said that
19 this defendant, 375 Canal LLC, will be criticized for renting
20 to local immigrant merchants and for not evicting them sooner.
21 As I stand here before you now, that remains true.

22 When I stood before you on Monday morning, I did not
23 say that the single watch that they claim was purchased on May
24 19th, 2012 was not counterfeit. I didn't say that. What I did
25 say was that Omega's story about the watch and who purchased it

J31VOME1

Summation - Mr. Schick

1 changed over time. As I stand here now, that remains true.

2 When I stood before you on Monday morning, I told you
3 that Steve and I will have to ask questions about the events of
4 May 19th, 2012, even though our client, the defendant, 375
5 Canal LLC, was not involved in those events. Well, boy, was
6 that true.

7 When I stood before you on Monday morning, I told you
8 that 375 Canal LLC did what Omega asked them to do in its
9 September 28, 2011 letter from Mr. Lindenbaum; and that we
10 never heard another word from them until they filed this
11 lawsuit a year later. As I stand here now, that remains true.

12 I'm not going to take the time to get into everything
13 that I said on Monday morning, but I will say this: As I stand
14 here now, it all remains true. You're smart. You paid
15 attention. You listened to everything. You get it. I trust
16 you.

17 By contrast, when Mr. Noyes stood before you on Monday
18 morning, he said that the evidence will show that the
19 defendant, 375 Canal LLC, profited from the sale of Omega
20 counterfeit goods. As we stand here now, that was not true.

21 Now, when I stood before you on Monday morning, I
22 raised questions about whether the watch they put before you
23 was sold at 375 Canal Street or was it sold at one of the five
24 other stores they visited that day, where they also purchased a
25 watch. I raised those questions because of the sloppiness of

J31VOME1

Summation - Mr. Schick

1 the Omega investigations.

2 As I stand here now I say this: After Omega spent two
3 days on that topic, they probably demonstrated that it was the
4 same watch. Now, things would have been way easier if they
5 just would have used a proper evidence bag, as Mr. Taute
6 explained to you was standard procedure.

7 I'll return to this topic in a few moments, but ask
8 yourselves this: You saw the Omega letter sent by
9 Mr. Lindenbaum on September 28, 2011; it's Exhibit PX 90. It's
10 before you. It didn't include any evidence -- none
11 whatsoever -- not even a name, let alone police records. It
12 didn't include anything that 375 Canal could use to convince a
13 judge to evict a tenant. Nothing at all.

14 Compare that letter, compare Mr. Lindenbaum's letter,
15 compare the Omega September 28, 2011 letter to the types of
16 letters and information that we saw from Ms. Silvey and her law
17 firm and Ms. Tritto. One approach -- you see some of those
18 there in front of you; it's PX 47, it's PX 87 -- talks about
19 seizure vouchers, talks about declarations, talks about all
20 sorts of information that's useful to help a landlord get a
21 counterfeiting selling tenant or subtenant out. So compare PX
22 90, the Omega/Lindenbaum/Collen letter with the other letters
23 you saw from Ms. Tritto, from Ms. Silvey, PX 47 and 87, and
24 others.

25 One approach helps combat counterfeiting. Another

J31VOME1

Summation - Mr. Schick

1 approach only helps collect a judgment in the lawsuits. Ask
2 yourself, which approach did Omega take?

3 We received nothing from Omega except for a lawsuit.

4 Now, let's talk about the only thing in this case that
5 really matters: The sale of Omega merchandise at 375 Canal
6 Street.

7 Remember on Monday I told you they are going to talk
8 about everything else and very little about Omega. That was
9 true. But we want to focus on Omega, because that's what this
10 lawsuit is about; that's the only thing they are entitled to
11 damages for, if at all.

12 Omega alleges two events, and two events only: A
13 December 7th, 2010 police raid on Canal Street, and a May 19th,
14 2012 purchase at 375 Canal Street.

15 Now, when we think about these two allegations about
16 Omega sales, the only two allegations about Omega sales, let's
17 keep two things in mind: First, that Omega -- and only
18 Omega -- has the burden of proof in this case; second, that
19 Omega does not allege that there was any Omega merchandise sold
20 at 375 Canal Street by anyone at anytime prior to December
21 2010.

22 So they talked all the way back to 2004, and they
23 talked for about a decade's worth of time. And they have
24 nothing about Omega for most of that time. Even though Omega
25 talked this week about stuff all the way back to 2004, none of

J31VOME1

Summation - Mr. Schick

1 that, not a piece of it, had anything to do with Omega; nothing
2 in 2004 regarding Omega, nothing in 2005 regarding Omega,
3 nothing in 2006 regarding Omega, nothing in 2007 regarding
4 Omega, nothing in 2008 regarding Omega, nothing in 2009
5 regarding Omega, and nothing in 2010 regarding Omega, until
6 they talk about the Canal Street police raid in December 2010.

7 So let's turn to that, the police raid on Canal Street
8 conducted by the Street Peddler's Unit that Mr. Taute talked
9 about, December 7, 2010. That's a very, very important date,
10 because Omega has to prove that 375 Canal LLC, the defendant,
11 knew that there was infringement of Omega trademarks at 375
12 Canal Street before May 19, 2012.

13 Let me repeat that.

14 For Omega to get anything in this case, Omega has the
15 burden of proof to establish to you, the jury, that there was
16 the sale of infringing Omega goods; that there was a sale of
17 counterfeit Omega goods at 375 Canal Street before May 19,
18 2012. Mr. Gunther spent very, very, very little time this
19 morning talking about December 7, 2012, and I don't blame him.
20 Because there's very little for Omega to talk about there.

21 Let's talk about what evidence they have about
22 December 7, 2010, evidence that is necessary for them to prove,
23 before you can even consider the events of May 19, 2012.

24 Well, Mr. Taute testified that he had no recollection
25 at all of the events of December 7, 2010. He testified he has

J31VOME1

Summation - Mr. Schick

1 no recollection of whether he was even present on Canal Street
2 that day. And I'm not saying that you're questioning whether
3 there was a police raid on Canal Street that day, Mr. Taute
4 told you that there was. I'll take him at his word.

5 But we do know what occurred at 375 Canal Street.

6 What we do not know what occurred at 375 Canal Street,
7 we do not know if Street Peddlers were swept up that day on the
8 raid or shopkeepers were swept up. We do know that the task
9 force conducting the raid was called the Street Peddler's Task
10 Force, and it did focus on street peddlers. Mr. Taute told you
11 that.

12 We do not know if someone was arrested in front of a
13 store, as Mr. Taute said often happened, or inside the store.

14 We do not know if someone was arrested after running
15 into 375 Canal trying to avoid the police.

16 Why don't we know the answer to these questions?
17 Because Omega did not get the documents that Mr. Taute said the
18 police department has that would answer the questions.
19 Mr. Taute testified that the police department keeps an arrest
20 log that would contain much more information that was in the
21 single email that we saw on this subject.

22 Mr. Taute said that the police department has a
23 database called OmniForm where the complete records are kept.
24 Omega could have gotten those documents. The police department
25 building, the NYPD headquarters, is a five-minute walk from

J31VOME1

Summation - Mr. Schick

1 this courthouse. The cost of getting a copy of a police report
2 is \$15. You can do it online. Look at the screen right in
3 front of you. You want a copy of a police report? You go
4 online, you walk five minutes from here, you pay \$15, and you
5 don't have to speculate, you don't have to guess, you don't
6 have to wonder. You actually know.

7 Think Omega could afford the \$15? It's Omega's burden
8 of proof, and they didn't spend \$15 to get the only document
9 that contains any proof. Think about that. Think Omega spent
10 15 bucks this week putting on this case?

11 Let's think about what Omega showed you instead of the
12 actual documents, the official police records. They showed you
13 a disposition record that Mr. Taute said he was not even sure
14 related to 375 Canal Street, a disposition record that,
15 according to Mr. Taute, could apply to 81 Mott Street; a
16 disposition record that showed that the resolution was for
17 disorderly conduct, something consistent with a street peddler
18 running into a store to avoid arrest.

19 Now, Mr. Cole says he was on Canal Street that day.
20 But does that make any sense? Is there even a single document
21 that places him there that day?

22 Mr. Gunther waved before you the May 23, 2012 report,
23 Exhibit 240A, about the events of May 19th, 2012. He waved
24 before you that big binder. And you'll have that big binder
25 with you. And, of course, you'll do what you need with that

J31VOME1

Summation - Mr. Schick

1 big binder.

2 But ask yourself this: If you place that big binder
3 in front of you on the left side of the table, on the right
4 side of the table place before you all the evidence you have
5 that Mr. Cole was there on Canal Street on December 7, 2012.
6 Did he prepare a report? Is there a single document that
7 places him there that day? No.

8 Did he prepare a report? Did Mr. Cole prepare a
9 report, as he testified he always did, as was his normal
10 practice? We haven't seen one. And more importantly, you
11 haven't seen one.

12 Did Mr. Cole submit an invoice for his work on Canal
13 Street that day, December 7, 2010? Again, we haven't seen one.
14 And more importantly, you haven't seen one.

15 Did Mr. Cole even send a single email to anybody
16 associated with Omega: Mr. Lindenbaum, Mr. Collen, Mr. Paul?
17 Did Mr. Cole send a single email to anyone demonstrating,
18 reporting, saying, showing, alleging that he was on Canal
19 Street on December 7, 2010? We haven't seen one. And again,
20 much more important than what I haven't seen, you haven't seen
21 one.

22 Now, Mr. Gunther said there's a picture that was taken
23 on December 7, 2010. Now, Mr. Taute said it was an
24 afternoon -- late afternoon raid that went on for hours, and so
25 I'm not -- I can't do all the fancy stuff that Omega and its

J31VOME1

Summation - Mr. Schick

1 team does. I can't bring in meteorologist weather people to
2 show you whether it can be this light on December 7th, that
3 late in the day, we can't do that. But we can talk about
4 common sense.

5 Mr. Cole says he's a trained investigator. So let's
6 look at this picture, that, nine years later -- I just want to
7 say it's pretty funny, right? Mr. Gunther criticized
8 Ms. Tritto for telling you about evicting a subtenant. And she
9 told you honestly, That would have been my practice, that's
10 what I would have done.

11 Did she say, Oh, I have a specific recollection of a
12 call that day? No, because most human beings don't have
13 specific recollections of calls ten years before, nine years
14 before, when Steve was in college. No.

15 So she told you honestly what her practice was and
16 what she would have done before she sent an email.

17 But Mr. Cole, Mr. Cole knows it all. Remembers
18 everything. Look at this picture. Trained investigator
19 charging good money to Omega, big company, working with a team.
20 Is there a time stamp on this photo? I don't see it. You
21 don't see it.

22 Is there any document that says this picture was taken
23 on December 7th, 2010? No, there isn't. I don't see it. You
24 don't see it. Is there an email that was sent that says back
25 then this picture was taken on December 7th, 2010? No.

J31VOME1

Summation - Mr. Schick

1 Now, look at the picture. Common sense, me and you,
2 regular folks, Brooklyn people. You see any police activity on
3 this? This is a picture of a police raid. Police raid. You
4 see the police officers? I don't. This is a picture to show
5 police activity. None there. This is a picture to show
6 arrests. Do you see anybody arrested? I don't see it. You
7 don't see it. It's not there.

8 Does it show any seized watches? This is their
9 evidence about December 7th? They want you to look at this
10 random picture that shows nothing and believe that when you
11 look at this and say, This shows you that in this store there
12 was a police officer arresting the shopkeeper with an Omega
13 watch. Well, I don't see it in the picture; you don't see it
14 in the picture. The picture is not there.

15 Now, let's go back to some common sense again.

16 Mr. Taute's email said that there were 14 different
17 locations where arrests were made on that afternoon. Do you
18 see that list? Fourteen different addresses.

19 Now, Mr. Cole testified he had you believe that at no
20 time was he targeting 375 Canal Street. He wasn't focusing on
21 375 Canal Street. Let me ask you, he wasn't targeting 375
22 Canal Street and he wasn't focusing on 375 Canal Street, how in
23 heaven's name would he remember that nine years ago he took a
24 picture of 375 Canal Street on that day at that time? It
25 doesn't make sense. It doesn't add up.

J31VOME1

Summation - Mr. Schick

1 Think about the evidence you see in this case, the
2 evidence we've seen when trademark owners send evidence
3 receipts. We've seen lots of that. Ms. Silvey talked about it
4 about her law firm; Ms. Tritto talked about it, when trademark
5 owners send evidence receipts.

6 Ask yourself: Has Omega even come close to meeting
7 its burden of proof that there was an infringing sale of Omega
8 watches at 375 Canal Street on December 7, 2010? The answer to
9 that, ladies and gentlemen of the jury, is no.

10 And again, the only reason we even have to ask the
11 question is because Omega did not bring the police department
12 records to court. Now, again, maybe that's because Omega can't
13 afford the \$15. Maybe, but I don't think so. Maybe they don't
14 want you to see the full records showed -- maybe they don't
15 want you to see what the full records showed. We'll never
16 know.

17 But I do know that if Omega hasn't proved an
18 infringement of its trademarks occurred at 375 Canal Street on
19 December 7th, 2010, this case ends. You have to find in favor
20 of 375 Canal Street. And Omega did not meet its burden and did
21 not prove infringing activity at 375 Canal Street on December
22 7, 2010. For that reason alone, you should find in favor of
23 the defendant, 375 Canal LLC.

24 Now, my time isn't up, so let's discuss the rest of
25 the evidence.

J31VOME1

Summation - Mr. Schick

1 After December 7, 2010, nothing much happens for a
2 long time. There's nothing in January 2011, nothing in
3 February, nothing in March, nothing in April 2011, nothing in
4 May, nothing in June, nothing in July, nothing in August,
5 nothing in September, till the very last Friday of the month,
6 September 28, 2011.

7 More than eight months goes by, eight months of
8 nothing, eight months of radio silence by Omega, the company
9 that claims it really cares about infringement and needs your
10 help. They didn't do anything with the information that we
11 know Mr. Paul had.

12 Mr. Paul says he had an email about December 7th,
13 2010. He said they need your help to crack down on
14 infringement. What did Mr. Paul do with that email? What did
15 Omega do with that email? Nothing. Total, absolute radio
16 silence until September 28, 2011. That's the day they finally
17 sent a letter, the letter we had before you before at PX 90,
18 the letter from Mr. Lindenbaum.

19 Now, keep in mind that Mr. Taute testified that the
20 police department did not, would not, inform the landlord about
21 the Canal Street raid on December 7, 2010. So Mr. Gunther
22 stood up here a little while ago and criticized Mr. Laboz for
23 not knowing about the police activity. Mr. Taute said the
24 police did not notify them. What Mr. Gunther didn't say is
25 that his client knew, the prior law firm knew, and they did

J31VOME1

Summation - Mr. Schick

1 nothing for nine months. Did Josh Paul, Jess Collen, Jeffrey
2 Lynn, did anybody in Omega's prior law firm say anything? No.
3 Total, absolute radio silence until September 28, 2011.

4 And then they finally send something.

5 Let's look at what they sent. Let's look at
6 Mr. Lindenbaum's letter before you, PX 90.

7 It has no details in it at all; not a name, not a
8 time, not a description of what was seized. Nothing. Oh, it
9 has one of my favorites. See it's highlighted? What does it
10 say? It has a great phrase: As you already know. We're all
11 familiar with that phrase from that cover-your-butt guy at work
12 that we can't stand. Well, excuse me, but of course 375 Canal
13 LLC did not already know. How could 375 Canal LLC already
14 know. Nobody told them anything. The police didn't tell them
15 anything, Mr. Taute testified to that. And Omega didn't tell
16 them anything, Omega admitted to that. Not only that, but more
17 importantly, there was nothing attached to the Omega Collen law
18 firm letter of September 28, 2011 that actually demonstrates
19 there was any infringing activity.

20 Now, we spoke before about the letters from Ms. Tritto
21 and Ms. Silvey and the law firms that would attach receipts,
22 things like that, one of the things that was evidence of
23 trademark infringement. What did Mr. Lindenbaum's letter
24 attach? What did Omega's letter attach? Look at these, an
25 array of trademarks, nine different ones. None of them in this

J31VOME1

Summation - Mr. Schick

1 case, but nine different ones. Did anybody even say there were
2 nine watches taken that day? Did they have any idea what
3 happened that day? He just threw everything in the kitchen
4 sink. He didn't say nine watches in his letter, but he says,
5 We got a lot of trademarks, something must have happened that
6 day, you now know. This is knowledge? What do we know?
7 Blancpain, are we here for that? Breguet? I can't even
8 pronounce some of these things so I'm not going to try. I
9 don't want to offend Omega.

10 But this is not evidence of anything related to
11 counterfeiting; this is evidence that Omega itself had no idea
12 what happened on December 7th, 2009. This is PX 90; you'll
13 have it with you. It's the attachment to Mr. Lindenbaum's
14 letter. It's the only thing Omega sent, not a seizure record,
15 not that \$15 police record, not the OmniForm database, not a
16 picture, nothing but this.

17 Now, as I said before, we've seen what other law firms
18 and trademark owners do, how they attach evidence. You see PX
19 44, Ms. Tritto and Ms. Silvey's law firm. Copies of the
20 receipts are attached for your review. That's evidence that
21 can be used. That's evidence that can hold up in court.
22 That's evidence that a trademark owner would send a landlord if
23 what they were interested in is eradicating the infringing
24 activity. Nothing like that was attached to Mr. Lindenbaum's
25 letter.

J31VOME1

Summation - Mr. Schick

1 Well, now let's go to what happened -- and that's
2 PX -- as I said, PX 44. You'll have it with you.

3 Now let's think about what happened after September
4 28, 2011. Surely Mr. Lindenbaum did send his letter and it was
5 received. Everybody agrees on that.

6 But what happened? Ms. Tritto followed up immediately
7 with Omega's lawyers. She spoke to Mr. Lindenbaum and she
8 reported that the offending subtenant had been removed.
9 Mr. Lindenbaum, Mr. Collen, Mr. Paul, and Omega, they were all
10 fine with that. How do we know? We've seen the email. Here's
11 the response, PX 91: The offending subtenant has been removed.

12 How do we know that Omega was fine with that? Because
13 after Ms. Tritto's October 3rd, 2011 email to Mr. Lindenbaum,
14 he and Mr. Collen, Mr. Paul and the entire Collen law firm and
15 the entire Omega machine, they returned to radio silence.
16 There was not a word. Not another word was heard from Omega or
17 its lawyers until they filed this lawsuit the following
18 September, September 2012, almost an entire year after
19 Ms. Tritto's email.

20 Now, just because Omega was silent doesn't mean that
21 important relevant things didn't happen between October 3rd,
22 2011 and September 2012. Some important relevant things did
23 happen.

24 Do you know what happened that was important? Omega
25 sent investigators to 375 Canal Street repeatedly between

J31VOME1

Summation - Mr. Schick

1 September 28, 2011 and February 2012. And each and every time
2 those investigators reported back, Omega's investigators
3 reported back that there was no Omega merchandise for sale at
4 375 Canal Street.

5 Let's look at the first of those visits on December
6 11, 2011. That's when William Quinonez visited 375 Canal
7 Street in search of Omega watches. Mr. Quinonez wrote back to
8 his boss, Mr. Cole, that there was no Swatch trademarks for
9 sale at 375 Canal Street. Mr. Cole, who was here as Omega's
10 witness, testified that meant there was no Omega merchandise.

11 Let's look.

12 Do you see it on top? It says DX DD, that's the one
13 on top. Mr. Quinonez to Mr. Cole, December 11, 2011 at 9:31
14 p.m. And it says on a -- 12/11/11, on December 11, 2011, a
15 visit was made to stores located at 375 Canal Street. And
16 there were no watches associated with the client's trademark,
17 Swatch. That means Omega. Photos were taken by cellphone and
18 were forwarded to you via text.

19 That's the only email, by the way, that we have that
20 mentions a photo, okay? Is that where Mr. Cole got the photo
21 that he sends on December 7, 2011, when Mr. Quinonez sent him
22 this email? He surely received it, because the next day, that
23 DX DD, look at that, the only email that talks about a photo.

24 Now look at DX EE, that's the one right below it.

25 So Mr. Cole, back to Mr. Quinonez. And it says: Hi,

J31VOME1

Summation - Mr. Schick

1 William. Reviewed your emails and text messages. All the
2 locations on the client's hit list either were closed down or
3 do not have watches, am I correct?

4 All the stores on the hit list, including 375 Canal,
5 were visited. And as Mr. Quinonez reported in DX DD,
6 Defendant's Exhibit DD, that email, there were no watches
7 associated with the client's trademark at 375 Canal Street.
8 None.

9 Now, let's go to the next visit, a visit that is
10 recorded in a December 30, 2011 memo from Mr. Cole. And
11 remember, Mr. Cole is Omega's witness. And he testified that
12 his practice was to prepare memos on the day of the activity
13 discussed in the memo, unless the memo says the activity
14 occurred on a different date.

15 So let's look at the December 30, 2011 memo.

16 It lists a whole bunch of addresses, including 375
17 Canal Street. Do you see that DX UU and attachment 10.
18 There's a file number -- there's a file number on top, 11-046.

19 My wife showed up. Sorry. Got distracted. She
20 apparently wants to make sure I'm actually working this week,
21 not playing hooky at home. I'm sorry.

22 So what does this show? DX UU, they visited 375 Canal
23 Street. No Swatch trademarks were observed for sale nor were
24 any offered for sale upon an undercover investigator's
25 inquiries. Mr. Gunther tried to get you not to think about

J31VOME1

Summation - Mr. Schick

1 this, right? Before he sat down he said, Oh, they are going to
2 talk about failed buys; you know, they just canvassed.

3 Well, two points on that. First of all, it says
4 inquiries. And second of all -- so first of all, the document
5 says it. They asked, prior exhibit says they asked, they asked
6 on December 11, 2011, there was no Omega trademark infringing
7 merchandise present. They went back on December 30 and there
8 was no Omega trademark infringing merchandise at 375 Canal
9 Street.

10 Now, wouldn't it be funny actually if Mr. Gunther
11 confuses you so much that -- right, he criticized Mr. Laboz for
12 saying, Oh, Mr. Laboz didn't go in and make undercover asks; he
13 just observed. Observing is nothing. And then he wanted you
14 to believe they paid Mr. Cole to observe, right? A canvass.
15 We paid Mr. Cole to walk down the street, not to ask questions.
16 Well, I know you know that defies common sense; but, more
17 importantly, it defies the truth. Wants the executive summary?
18 No Swatch Group trademarks were observed for sale nor were any
19 offered for sale upon an undercover investigator's inquiries.
20 DX UU, pages 10 and 11. We go to the prior one, back for one
21 second, December 11, 2011, there were no watches associated.
22 None.

23 So we know after September 28, 2011, what was radio
24 silence from Omega to us, 375 Canal LLC, about any concern they
25 have, any ongoing questions, any issues. They were repeatedly

J31VOME1

Summation - Mr. Schick

1 going to the location, they are seeing what goes on there, they
2 are reporting back internally that there was no Omega
3 merchandise for sale there. And they are going and they are
4 taking pictures and they are not complaining about the way the
5 store looks, they are not complaining about anything.

6 Now, let's move forward about six weeks to mid
7 February 2012. And this is from DX NN. Again, here it says --
8 same reference -- do you see the file number that's highlighted
9 in the lower left? The same file number as the December 30
10 report, the same investigation. See? UU is 11-046. Now, if
11 we roll forward, the next one, NN, the February 21st cover
12 email, what does it say? Same file number. This is the same
13 investigation.

14 Now, it notes 81 Mott Street. Remember I mentioned 81
15 Mott Street before, the address that Mr. Taute said could be
16 linked to the arrest disposition record that Mr. Gunther showed
17 him, that Omega showed him? It notes activity there. It notes
18 problems there. It says executive summary. Is this a canvass?
19 Counterfeit Omega watches were being sold on the street by
20 street sellers and in storefront retailers hidden away from
21 public view in drawers.

22 Did Mr. Cole or Mr. Lindenbaum ascertain by walking
23 down the street that certain of the stores that day were
24 selling Omega counterfeit merchandise by not going inside and
25 asking? Hidden? Of course not. They went in; they asked;

J31VOME1

Summation - Mr. Schick

1 they tried to buy. Where they could buy, it's noted, 81 Mott
2 Street. Where they didn't buy, they didn't buy.

3 Where didn't they buy? They did not buy at 375 Canal
4 Street. This is a report; you see it's an email. You'll have
5 it with you. DX NN. Mr. Cole is reporting to Mr. Lindenbaum
6 about what he found, what he thinks, what he saw, what he
7 bought, and then where he didn't buy. So it tells you where
8 they purchased watches, and then there's locations where they
9 didn't find anything. And one of the places they found
10 nothing, again, 375 Canal Street.

11 Now, I want to pause here for a moment.

12 I want you to think just for a moment about the
13 evidence that plaintiffs' own hired investigators generated
14 that shows that there was no Omega merchandise for sale at 375
15 Canal Street. We have emails from Mr. Quinonez, Mr. Cole; we
16 have documents; we have reports, you've seen them: DX UU, DX
17 NN, and others. Contrast how complete the evidence that there
18 was no watches for sale at 375 Canal Street is; contrast that
19 with the utter lack of any evidence supporting Omega's claim
20 about infringement at 375 Canal Street on December 7, 2010.
21 Three reports with emails and other things when there isn't
22 anything found there, no document when they say there was
23 something there. But they say trust them, believe me. We just
24 didn't spend the 15 bucks.

25 Now, Omega has an email saying there was a police raid

J31VOME1

Summation - Mr. Schick

1 on Canal Street on December 7, 2010. We told you that. But
2 just because it was a police raid on Canal Street does not mean
3 there was infringing activity at 375 Canal Street. We wouldn't
4 be asking you to guess. It's their burden of proof, but they
5 wouldn't be asking you to guess if they didn't have to. And
6 they could have paid \$15 for the police report.

7 Ladies and gentlemen, when you go into the jury room,
8 and you think about what was proven in this case, and you have
9 to find infringing activity on December 7, 2012 to even go
10 forward -- December 7, 2010, my apologies, ask yourselves the
11 lack of evidence that there was any sales of infringing
12 activity on December 7, 2010, with the hard evidence of Omega's
13 own investigators about nothing for sale, no Omega merchandise
14 for sale at 375 Canal on December 11, 2011, on December 30,
15 2011, and on February -- I believe it's 18 -- it's covered in
16 the February 21 email -- 2012.

17 Now let's turn to May 19, 2012. As I said earlier, we
18 never said that the watch purchased that day was not
19 counterfeit. We didn't say it in the morning of Monday when we
20 were here. We raised questions about whether the watch they
21 were showing was purchased at 375 Canal Street or was it one of
22 these five other watches that they bought at five different
23 locations that day, the stores that were not associated with
24 375 Canal Street. We raised questions because of how sloppy
25 Omega's investigators were.

J31VOME1

Summation - Mr. Schick

1 Mr. Taute explained it in about 30 seconds how easy it
2 is to proper tie off an evidence bag. Mr. Cole gave a song and
3 dance about not being able to do that on the street. But, come
4 on, they were on the street on Canal Street on May 19, 2012 for
5 a few minutes or a few hours in total, if you think about all
6 the stores. The watch stayed in the Ziploc bag for about seven
7 years.

8 But after spending hours and hours on it this week,
9 with video editing that would make Sports Center proud and
10 would make John Madden proud, I will say that I do not question
11 whether the watch that they showed you, the watch that
12 Ms. Quinonez purchased seven years ago, was at 375 Canal
13 Street. But that doesn't mean anything unless 375 Canal Street
14 had prior knowledge of an infringing sale of Omega merchandise
15 at 375 Canal Street, and it didn't.

16 Now Omega, Mr. Gunther, have made a big deal about the
17 fact that there was a storage room at 375 Canal Street.
18 Really? Maybe it's the Brooklyn in me. I don't know where
19 they shop, but every bodega I've been in in my life, every New
20 York City retail store, every shop, it has a closet, it has a
21 place for inventory, it has a place to hang your coat, every
22 single one. There's nothing nefarious about that.

23 Now, it's true the tenant, T.A. Discount, was not
24 supposed to have built a wall in the back of the store, that's
25 true. And the least that 375 Canal LLC provided for the tenant

J31VOME1

Summation - Mr. Schick

1 said that the tenant had to keep the store as delivered by 375
2 Canal LLC, that's before you as PX 206.

3 Tenant shall make no changes without owner's prior
4 written consent, see that? No alterations. That's paragraph
5 3.

6 Paragraph 45: Tenant shall not sell, trade, broker
7 counterfeit merchandise of any kind.

8 We put in the necessary precautions. We gave it to
9 the tenant as we were supposed to give it, without a back wall.
10 How did we know that's how 375 delivered the space? Because as
11 Mr. Laboz explained, the city insisted on the right to a
12 walk-through before the tenant moved in. That's right, before
13 T.A. Discount moved in, New York City inspected the space. The
14 city enforced the agreement it signed.

15 And keep in mind that Omega sent an investigator to
16 375 Canal Street many, many times by May 19, 2012: December
17 11, December 30, February 18. Did they ever notify 375 Canal
18 that it did not like the interior of its space? Did it ever
19 follow up to Mr. Lindenbaum's September 28th letter? Was that
20 one of the complaints? Was that one of the remedial actions
21 asked for in Mr. Lindenbaum's letter?

22 We'll see it again soon. The answer is no. Never.

23 Now, we saw a thick report that Omega prepared about
24 May 19, 2012. It was used during Mr. Cole's testimony, and
25 Mr. Gunther showed it -- waved it to you this morning.

J31VOME1

Summation - Mr. Schick

1 Mr. Gunther asked Mr. Laboz about his reaction to the
2 report. And Mr. Gunther didn't like Mr. Laboz's reaction. But
3 what Mr. Gunther left out is that Omega or its lawyers at the
4 time did not provide 375 Canal with that report. Mr. Laboz
5 didn't get that report. 375 Canal LLC didn't get that report
6 or any information after its May 19, 2012 purchase of an Omega
7 watch. They didn't get it in May 2012, they didn't get it at
8 any time in 2012, they didn't get it at any time in 2013.

9 Mr. Gunther asked Mr. Laboz yesterday about the video
10 they have played forwards and backwards this week. And he
11 asked him, Did you watch it? And he tried to suggest to you
12 that, Oh, if he didn't spend a lot of time watching it, that
13 means he didn't care. Again, what they left out was that Omega
14 did not provide any video in May 2012, again, or at any time in
15 2012 or at any time in 2013.

16 Now, you've seen this week the evidence, the
17 testimony. You heard and saw evidence and testimony about how
18 trademark owners operate. You heard Ms. Silvey and her firm;
19 you heard about Ms. Tritto. You know what a trademark owner
20 does when they want to work with a landlord to crack down on
21 counterfeiting.

22 But that's not the approach Omega took. They said
23 they did nothing from May 2012, when Ms. Quinonez purchased the
24 watch, until September 2012. Again, they say need --
25 Mr. Gunther said he needs your help this morning to crack down.

J31VOME1

Summation - Mr. Schick

1 Well, they certainly need somebody's help because, you know,
2 they waited from December -- they say they waited from early
3 December 2010 till the very end of September 2011 the first
4 time to crack down, they couldn't get a letter out. And then,
5 after they saw infringing activity, May 19, 2012, they waited
6 another five months, unlike everything we've seen from
7 Ms. Tritto and Ms. Silvey.

8 And then what did they do when they broke their
9 silence? They filed this lawsuit. What did 375 Canal LLC do?
10 What did Mr. Laboz do? They evicted the tenant. Here you see
11 PX 206. You've got a lawsuit. The lawsuit at least had some
12 specific allegations, something that they can move upon, as
13 opposed to Mr. Lindenbaum's September 28, 2011 letter, and they
14 evicted the tenant. The tenant was gone by Thanksgiving.

15 When Omega finally got around to providing Mr. Cole's
16 report of the May 19, 2012 investigation, it was more than a
17 year after 375 Canal LLC had already evicted the tenant in the
18 space at the time the report was made.

19 The same thing was true with the video. By the time
20 Omega provided the video, it was more than a year after 375
21 Canal LLC had evicted the tenant who was in the space at the
22 time of the video.

23 Omega didn't provide the May 19, 2012 report or the
24 video of May 19, 2012, to provide evidence to help 375 Canal
25 LLC evict a tenant; they sent it more than a year later, more

J31VOME1

Summation - Mr. Schick

1 than 18 months later, when they wanted to use it to support
2 their claims in this case. Now, they are entitled to choose to
3 do that, but they can't turn around and criticize Mr. Laboz for
4 not pouring over it closely two years after the fact and a year
5 and-a-half after he had already evicted the tenant.

6 Now, that's all there is about allegations of Omega
7 merchandise at 375 Canal Street: A general police raid on
8 Canal Street in December 2010, and the purchase of a watch in
9 May 19, 2012, with three repeat visits by Omega investigators
10 in between that demonstrated there were no watches, no Omega
11 watches for sale.

12 Now, of course, as Steve and I predicted to you on
13 Monday morning, you are going to hear a lot more in this case
14 about other brands than you were going to hear about Omega.

15 Let's talk quickly about some of that.

16 You heard this morning and during this week about a
17 settlement with Louis Vuitton in 2006. Omega showed you a
18 settlement agreement with Louis Vuitton. It's a settlement
19 agreement in which Louis Vuitton permitted the tenant to remain
20 in place. Louis Vuitton permitted in the settlement the tenant
21 to remain in place.

22 Now, ask yourself, was Louis Vuitton guilty of
23 contributory trademark infringement because it permitted the
24 tenant who sold counterfeit merchandise, counterfeit Louis
25 Vuitton merchandise at that, to stay in its place? No. It was

J31VOME1

Summation - Mr. Schick

1 guilty of being human, of not taking away the livelihood of
2 someone who made a mistake, who stepped over the line, who did
3 something wrong. It was guilty of giving a second chance.

4 Now, Louis Vuitton asked for 375 Canal LLC to pay for
5 a monitor to make periodic visits to the store to report back,
6 and asked 375 Canal LLC that signs be posted. Do these things
7 help? Do they matter? I don't know. Louis Vuitton wanted it
8 and so they did it. 375 Canal always went along with the
9 trademark owner's requests. That's what Ms. Silvey's testimony
10 was, that was Ms. Tritto's testimony. If they got complaints
11 from a trademark owner, they addressed it.

12 Mr. Gunther this morning made a big deal about signs,
13 big deal about monitors. Are these the persons that really
14 matter? Of course, the jury decides that, not myself and
15 Mr. Gunther.

16 Luckily we have a guide over here.

17 There's a settlement with the city in 2005.

18 What did the city want? What did the Corporation
19 Counsel's office ask for? Here you have it before you, PX 137.

20 Did the city demand or require a monitor?

21 No.

22 Did the city demand or require the sign be posted?

23 No.

24 Now, do you think that's because New York City was
25 soft on counterfeiting? Do you think it's because -- no, it's

J31VOME1

Summation - Mr. Schick

1 because that stuff didn't work, in their opinion; because it
2 wasn't meaningful. Because the City of New York wasn't engaged
3 in the game of gotcha.

4 Now, what does the agreement say about fines or
5 penalties? It says that next time if 375 Canal LLC was at
6 fault it would have to pay \$3500. The City of New York said in
7 a settlement agreement with a landlord about counterfeit
8 activity at its space, that next time it would have to pay
9 \$3500. That's PX 137.

10 The next settlement with the city was in September
11 2006. Why did the city want this settlement? Well, for
12 starters, like the Louis Vuitton settlement, the city permitted
13 the tenant to stay. It's in front of you; it's PX 140.
14 Defendant Jian Liang Ge was permitted to stay; paid a fine, was
15 permitted to stay. Paragraph 5, paragraph 7.

16 Ask yourselves, was the City of New York guilty of
17 contributory trademark infringement because it permitted Jian
18 Liang Ge, who had sold counterfeit merchandise, to stay in its
19 space? No, again, it was guilty of being human, of not taking
20 away the livelihood of someone who made a mistake, who stepped
21 over a line, who did something wrong, was guilty of giving a
22 second chance.

23 The city wanted 375 Canal LLC to pay a \$2,000 fine.
24 Look at paragraph 8. That's right, \$2,000. Couple of zeroes
25 short of what Mr. Gunther suggested this morning for each mark.

J31VOME1

Summation - Mr. Schick

1 Once again, the city did not request or demand a
2 monitor. And once again, there was no signs requirement, not
3 because it was going soft on counterfeiters, not because it was
4 in cahoots with counterfeiters, not because it was profiting
5 off counterfeiters, not because it didn't care about
6 counterfeiters, but because the city knew what did work and
7 what didn't work. They knew what made a difference. The City
8 of New York, again, it wasn't about a game of gotcha.

9 There was one more settlement with the city, October
10 11, 2009. In that case they wanted 375 Canal LLC to evict a
11 tenant, which it did. And the city wanted a \$10,000 fine,
12 which it received. \$10,000. Again, not a number on the Omega
13 calculator.

14 The city also wanted the right to walk through and
15 inspect the space to see that there was no back wall before the
16 tenant moved in. And 375 Canal LLC did that; and it included
17 in its lease with the tenant a provision prohibiting from
18 altering the space. We saw that before.

19 Now let's turn to a February 12, 2005 letter you were
20 shown this week. Let's see what trademark owners asked for,
21 what 375 LLC did, right. We saw, we heard Ms. Silvey and the
22 documents she and her law firm prepared: PX 23, the February
23 2005 complaint letter. If you look at it, it attaches
24 evidence, evidence that a trademark owner -- that a landlord
25 can use in a legal action against an infringer.

J31VOME1

Summation - Mr. Schick

1 And what did Ms. Tritto do for 375 Canal LLC when they
2 received it? Well, the letter is dated in February; by April
3 it sent out a notice to cure; and by May they sent out a notice
4 of termination. When they were given evidence, you'll see
5 these all in front of you, PX 23 is Ms. Silvey's letter. Her
6 name is not on it, but she's the one who spoke about it. The
7 name Heather McDonald was on it. She testified Ms. McDonald
8 was a partner at the firm, Ms. Silvey was a paralegal who
9 worked with her. It's the February 22 complaint letter, PX 23,
10 and at DX A, it's the follow-up, a late February complaint, a
11 notice to cure, a notice of termination.

12 Here's another letter from Ms. Silvey in March 2007,
13 PX 47. It's a March letter with a complaint. Again, you'll
14 see Ms. Tritto asked for the evidence so that it will assist in
15 the eviction. The tenant was evicted by April 2007. A month
16 later, when the trademark owner wants to actually combat
17 counterfeiting, it provides the evidence so that the landlord
18 can do an eviction.

19 What does it show you? It shows you that 375 Canal
20 LLC cooperated with any complaints received; 375 Canal took
21 action after it received the complaint; 375 Canal LLC did what
22 was necessary to combat infringement, activity that took place
23 by occupants in the space it owned.

24 Now I want to turn to a different topic, a topic that
25 Mr. Gunther covered, and that's the elements in this case.

J31VOME1

Summation - Mr. Schick

1 And when you think about the elements, you'll hear and
2 you'll know this case isn't about other trademarks or earlier
3 complaints of other trademarks. Those trademark holders aren't
4 the plaintiff here today. Omega is not entitled to anything
5 because a tenant of 375 Canal LLC may have sold a Prada bag in
6 2004. This case is about Omega. This case is about whether
7 375 Canal LLC contributed to infringement of Omega's
8 trademarks, that's all this case is about.

9 Judge Crotty will instruct you on the legal standard
10 in this case. He will instruct you that, among other things,
11 to find 375 Canal LLC liable, Omega must prove by a
12 preponderance of the evidence that 375 Canal LLC had knowledge
13 of infringement of Omega's trademarks by an occupant of its
14 property, continued to rent to an occupant that it knew had
15 infringed or was infringing on Omega's trademarks, and failed
16 to take reasonable remedial steps to try to stop the
17 infringement.

18 Let's talk about those piece-by-piece.

19 The first element, the first aspect of that, is
20 knowledge. For knowledge, Omega must prove that 375 Canal knew
21 or had reason to know that an occupant of its premises was
22 infringing on Omega's trademarks.

23 Now, is there any way that 375 Canal had knowledge
24 before September 28, 2011, when the Lindenbaum Omega letter
25 finally was sent to Mr. Laboz, when it was finally sent to 375

J31VOME1

Summation - Mr. Schick

1 Canal LLC? Of course not. Mr. Taute testified he did not
2 notify 375 Canal LLC about the police raid. Both Ms. Tritto
3 and Mr. Laboz testified they never received anything about it.
4 And, of course, Omega and its lawyers this week did not show
5 you any evidence that 375 Canal received any notice of any
6 potential Omega trademark violations issues until September 28,
7 2011. So there surely could not have been knowledge before
8 that point.

9 Now, again, let's look at the September 28, 2011
10 letter. What does it say? It's PX 90. It says there were
11 police raids. Throws up no receipts, no pictures, no reports,
12 no emails, no documents. Throws up the names -- the trademarks
13 of nine different watches, because they don't know what
14 happened that day. They have no evidence of what happened that
15 day. They have no seizure records. They have no police log.
16 They have no arrest record. They didn't try to get it, not
17 between December 7th, 2010 and September 28, 2011; and worse,
18 not at any point until today.

19 But let's focus on what 375 Canal did after it
20 received that letter.

21 Well, for that, we should talk about the next factor,
22 contributory infringement, whether 375 Canal continued to rent
23 its premises to one who know or had reason to know was
24 infringing on Omega's marks. Did 375 Canal do that?
25 Absolutely not.

J31VOME1

Summation - Mr. Schick

1 Ms. Tritto testified that she had the offending
2 subtenant removed. We saw that October 3rd, 2011 email. And
3 Omega was fine with that.

4 But that's not all we have.

5 We also have the three investigations conducted by
6 Mr. Collen's colleagues. We have the December 11, 2011
7 investigation in which Mr. Quinonez reports that all the
8 stores, all the locations, all the addresses, all the landlords
9 on the hit list that were provided by Omega, including 375
10 Canal LLC, had no watches; that no Omega watches were found at
11 375 Canal LLC. Again, you'll see it; DX DD, that's Exhibit DD
12 in defendant's binder, and EE.

13 And we have a December 30 report from Mr. Cole that
14 also reported that there were no Omega watches for sale at 375
15 Canal Street. That's UU. No Swatch Group trademarks were
16 observed for sale or any offered for sale upon an undercover
17 investigator's inquiries. Not a canvass, an inquiry.

18 And finally, we have the Collen/Lindenbaum joint
19 investigation in February 2012. What did that investigation
20 turn up? Certainly the big news was not about 375 Canal
21 Street, that's for sure.

22 So let's go back to the prior factor, knowledge.

23 Even if you assume that 375 Canal had somehow received
24 knowledge in late September 2011, by Mr. Lindenbaum's letter,
25 did they still have knowledge by May 2012? Well, no, of course

J31VOME1

Summation - Mr. Schick

1 not. How could they? They have removed the offending
2 subtenant, to the satisfaction of Omega. And Omega's own
3 investigator's reports show that that was a successful
4 remediation. There were no Omega watches for sale found at 375
5 Canal Street on three subsequent visits: December 11, 2011,
6 December 30, 2011, February 18, 2012. You'll see the email is
7 February 21; it attaches the February 18, 2012 report.

8 December 11, right -- September 18, 2011. Let's think
9 about the timeline. The notice letter, if that does provide
10 notice, was September 18, 2011 -- September 28, 2011. That's
11 the Lindenbaum letter. By October 3rd, Ms. Tritto reports back
12 that they have removed the offending subtenant. That's the
13 remediation. Omega accepted that. Mr. Lindenbaum accepted
14 that. And then there were three follow-up visits:

15 December 11th, 2011, Omega reports back --
16 Mr. Quinonez reports back that there were no watches at 375
17 Canal. The remediation worked.

18 Three weeks later, December 30, 2011, Mr. Cole reports
19 no watches for sale at 375 Canal Street. The remediation
20 works.

21 Let's go forward six weeks this time. February 18,
22 2012. Mr. Cole's report, again, there were no watches. The
23 remediation works.

24 Now, it's true that after February 18, 2012, there was
25 a sale of an Omega watch on May 19, 2012, a counterfeit Omega

J31VOME1

Summation - Mr. Schick

1 watch, when Mr. Cole and a team of five investigators showed
2 up, this time with video cameras. And boy, wouldn't it be nice
3 if you actually had the video of all the prior three visits
4 that we're talking about here. And someone bought a watch.
5 That's unfortunate. It's wrong. It shouldn't have happened.
6 Someone should not have been selling a counterfeit watch out of
7 that space. But does the fact that it's wrong and it shouldn't
8 have happened, does that mean that 375 Canal LLC had knowledge
9 that it was going to happen? No.

10 Finally, the judge will instruct you about the final
11 factor for contributory infringement, which is whether 375
12 Canal took reasonable and remedial steps to try to stop the
13 infringement. That's right, try. Not always successful, but
14 you take a reasonable step to try to stop it.

15 Did 375 Canal LLC do that? Well, they made sure that
16 the offending subtenant was removed. Ms. Tritto told Omega
17 that's what she did, and Omega was okay with it. You haven't
18 heard a word this week about Omega pointing to Mr. Lindenbaum's
19 letter and saying that they somehow responded to Ms. Tritto
20 saying, We asked you a whole bunch of things in that letter, A,
21 B, C, D. Why didn't you do them? You didn't hear a word.
22 Omega didn't write back; didn't ask for more. There was radio
23 silence for a year until this lawsuit.

24 Let's talk for a moment about when the lawsuit was
25 filed.

J31VOME1

Summation - Mr. Schick

1 After the lawsuit was filed, 375 Canal did remove the
2 tenant as well. That was reasonable under the circumstances.

3 In September 2011, they believed the issue was the
4 subtenant, because that is who they ensured was removed. It
5 appeared effective. Omega certainly never followed up to ask
6 for more, and plaintiffs' own investigators showed that there
7 were no Omega watches for sale anymore.

8 But, unfortunately, there was a problem on May 19,
9 2012. That was not brought to 375 Canal's attention until
10 September 2012, four months of silence. But once it was
11 brought to their attention via this lawsuit, what did they do?
12 They learned of the May sale; they promptly took action against
13 the tenant; the tenant was gone by Thanksgiving. They took
14 reasonable remedial steps.

15 So at the end of the day, the question is simple:
16 Does all of that amount to someone who was knowingly
17 contributing to the infringement of Omega's trademarks? The
18 only reasonable answer, I believe, is no.

19 Now I want to turn to my last point. It's about the
20 damages.

21 I want to conclude this morning by talking about the
22 penalty that Omega wants you to impose on 375 Canal.

23 First let's review what you, the jury, have to decide.

24 The judge will tell you you'll have to decide the
25 damages are for willful conduct or not. If the conduct is not

J31VOME1

Summation - Mr. Schick

1 willful, the range of damages that you must decide is between
2 \$1,000 and \$200,000. You are the ones to decide that; not
3 Omega, not Mr. Gunther, not me. You are the ones.

4 Was there any willful conduct? It's hard to see how
5 even Omega could allege that there was willful conduct with
6 respect to Omega merchandise between knowledge on September 28,
7 2011, and the purchase of May 19, 2012. How could there have
8 been any willful conduct? They got a letter September 28, they
9 had a subtenant out of the space by October 3rd, they
10 communicated that to Omega; Omega didn't complain. And then
11 three follow-up times Omega said in its own internal reports
12 there were no watches for sale there. I don't know how anybody
13 could say that that was willful, willful misconduct, willful
14 disregard, with respect to Omega trademarks.

15 The only timeframe here -- right, they go back to 2004
16 about the case. But the only time frame here with Omega is
17 December 7, 2010, when they allege is a raid. But even they
18 don't say that anybody told 375 Canal about that until
19 September 28th. So willfulness couldn't start until September
20 28th, 2011, when it was brought to their attention.

21 Could they have been willfully guilty of anything
22 between September 28, 2011 and May 2012, when they got rid of
23 the subtenant? When there was no complaint? When there was
24 radio silence from Omega? When there are three reports by
25 Omega's investigators that there were no offending Omega

J31VOME1

Summation - Mr. Schick

1 merchandise to be found at 375 Canal between September 28, 2011
2 and February 18, 2012? I do not think so.

3 So I don't think that there's any basis for you to
4 consider willful damages. But, again, that's not my decision;
5 that's your decision.

6 And so let's review what your range is in that case.

7 In that case, your range is not 1,000 to 200,000, it's
8 1,000 to \$2 million. In other words, the \$1,000 end of the
9 damages remains the same, whether its willful or nonwillful; in
10 either case you could award \$1,000. The only thing that
11 changes is on the upper end, it allows you to go above 200,000.
12 But it does not require you to do that. It does not require
13 you to go past \$1,000.

14 Now, please, you don't have to take my word for that.
15 You will hear from Judge Crotty and, of course, you can always
16 send him a question if you are not clear about any of the
17 issues.

18 Now, in thinking about damages in this case, you're
19 lucky to have been presented a guide. You have me talking, you
20 have Mr. Gunther talking, but we also have an unbiased guide.
21 I represent 375 Canal, Mr. Gunther represents Omega; you pretty
22 much knew before we came in this morning more or less which
23 positions we're going to take about that issue, right? We
24 didn't shock you; you're not shocked to hear I don't think you
25 should give them anything or much; you're not shocked to hear

J31VOME1

Summation - Mr. Schick

1 that Mr. Gunther thinks you should give them \$8 million, or
2 maybe you are shocked. But, in any event, it doesn't surprise
3 you, right?

4 But you have an unbiased guide who can help you.
5 Who's that guide? The City of New York. Because we saw what
6 kind of penalty New York City thought was appropriate: \$2,000.
7 Look at paragraph 8. This is PX 140, a settlement with The
8 City of New York. \$2,000 is what 375 Canal LLC had to pay.

9 Now, what is Omega asking you to do here? It's asking
10 you to award 1,000 times that amount for each trademark on the
11 same watch; wants you to take the \$2,000 that the city thought
12 was appropriate in its settlement, multiply that by 1,000, and
13 then multiply that again by each time it says you find the mark
14 on the watch.

15 Now, what do I mean for each trademark on the same
16 watch? Mr. Gunther touched on it for a moment, so I just want
17 to go back very quickly.

18 We know we hear about the sale of the counterfeit
19 Omega watch that was sold at 375 Canal on May 19, 2012, one
20 watch. But Omega says, Hey, wait a minute. One watch, but
21 four different trademarks on that watch.

22 Let's take a look.

23 One mark is Seamaster. That surely appears on the
24 watch. Then there are three more. One of them is the Omega
25 letter or symbol. You see that. Now, the trademark for the

J31VOME1

Summation - Mr. Schick

1 Omega letter or symbol says in the highlighted thing, it's
2 PX 3 -- a little difficult to read, but you'll have it in front
3 of you -- it generally appears with the word "Omega." In other
4 words, the symbol Omega, the trademark for the symbol Omega,
5 generally appears with the word "Omega." That's PX 3.

6 Let's look at the next one, PX 4. It's the Omega
7 symbol together with the Omega trademark. In other words, PX 4
8 is always as PX 3 is generally. PX 3 is generally the symbol
9 of Omega, together with the word "Omega"; PX 4 is the symbol of
10 Omega, always with the word "Omega." That's the difference.
11 Not how they look. One's generally like that, one's always
12 like that.

13 What's the third trademark? Well, that one is the
14 word "Omega." That's right. The Omega symbol, the word
15 "Omega," and the combination of the two are three separate
16 trademarks.

17 Now, it's their trademarks. I'm not going to start
18 with what kind of this does, trademarks. I'm not saying they
19 are not three separate trademarks, but they are asking you for
20 a penalty here. Does anybody think the conduct was three times
21 as bad and the penalty should be three times as high because
22 the Omega symbol and the Omega word together can be three
23 separate trademarks? Only in lawyers' gotcha land. Come on.

24 Again, you have a guide here. You don't have to trust
25 me. You don't have to trust Mr. Gunther. You have the City of

J31VOME1

Summation - Mr. Schick

1 New York. You know what they have done. They set a penalty at
2 \$2,000. Once there was no penalty, \$2,000. While Jian Liang
3 Ge stayed in the space. Jian Liang Ge paid \$8,000. That's
4 right, the higher end of the range is for the person who is
5 selling a store full of counterfeit Omega goods, not the
6 landlord. The higher end of the range is the person who is
7 distributing counterfeit Omega merchandise across the
8 neighborhood, not the landlord of a store where a single Omega
9 watch was sold. It's for the manufacturer supplying large
10 quantities of counterfeit merchandise, it's not for the
11 landlord of a store where a single Omega watch was sold.

12 Now, Omega says they need deterrence. Ask yourself,
13 do you really believe that's why Omega brought this lawsuit?
14 Do you really believe that's why Omega is here this week?
15 Everything you saw and heard this week, think about that.

16 Finally, Omega says you should send a message.

17 Send a message? Send a message to who? To a landlord
18 who they say spent tens of thousands of dollars on legal
19 proceedings, and they criticized for not spending 50 bucks on a
20 sign that the City of New York never said was meaningful, not
21 required. Why? You think the landlord wanted to save 50 bucks
22 and instead spend tens of thousands of dollars? Send a message
23 to the landlord who they admit spent tens of thousands of
24 dollars on legal fees anytime a trademark holder brought it to
25 its attention.

J31VOME1

Summation - Mr. Schick

1 Send a message to who? To the landlord whose leases
2 prohibit counterfeiting? You see the lease is in front of you.

3 Send a message to who? To the landlord who followed
4 up appropriately and effectively with every trademark owner who
5 ever contacted it with a complaint?

6 Send a message to who? To the landlord who had a soft
7 spot for the immigrant and the local merchant?

8 Send a message to who? To the landlord who gets more
9 rent from Bank of America and could get more money from
10 Starbucks, but doesn't, so he can give local merchants a shot?
11 Locals who are all described at Omega as Hindu male?

12 Send a message to who? To the landlord who sees them
13 not as Hindu male, but as human beings, as individuals with a
14 dream who deserve a chance? Just like their dad had and a
15 dream was given --

16 MR. GUNTHER: I object to that, your Honor.

17 MR. SCHICK: Send a message to who? To the landlord
18 who created a residency program for local artists and who
19 helped pay for a program to support local artists out of his
20 own pocket?

21 THE COURT: Mr. Schick, are you coming to a close?

22 MR. SCHICK: Yes, sir.

23 New York needs more landlords like him, not fewer.
24 They need to be praised, not punished or penalized.

25 Think about the evidence you saw this week and think

J31VOME1

Summation - Mr. Schick

1 about the evidence you did not see.

2 Omega said this man sold a watch on May 19, 2012.
3 They don't say who he is. They don't tell you what his name
4 is. They don't say where you first got the space. They don't
5 say he ever sold counterfeit Omega before. They don't say he
6 ever sold any counterfeit of any type before. They don't say
7 375 Canal had knowledge of his activity.

8 Omega needs to prove that prior to May 2012, there was
9 a sale of Omega merchandise at 375 Canal Street. What do they
10 have on that? A police raid on Canal Street in December 2010.
11 Where's the evidence that anything occurred at 375 Canal Street
12 that day? They don't have any. Why? Because they wouldn't
13 get or show you the complete official police records.

14 A record is available two blocks from here, and that
15 they could have purchased for \$15. Well, Omega's refusal to
16 spend \$15 on real evidence does not entitle them to \$8 million
17 from 375 Canal LLC.

18 It's been a long week. Steve and I and Sarah and Jody
19 and Jason and Albert Laboz appreciate your service this week.
20 We appreciate your attention.

21 All we ask you to do now is to think about the
22 evidence, listen to what you heard, and remember what you did
23 not hear. And most importantly, we ask you to do justice.
24 That's what the City of New York does, justice.

25 We think Omega hasn't proven its case. But if you

J31VOME1

Rebuttal - Mr. Gunther

1 disagree and think there must be a penalty, let's look at what
2 we think the penalty should be. It ought to be in the
3 thousands of dollars, like New York City demands in its
4 settlements, not in the hundreds of thousands of dollars or the
5 millions of dollars like Mr. Gunther is demanding.

6 Justice, that's all we ask you for. Justice, like the
7 defendant 375 Canal provided when dealing with others who
8 sought a chance. All we are asking for today is justice.

9 We thank you so much for your service this week.

10 THE COURT: Mr. Gunther, you have a short rebuttal?

11 MR. GUNTHER: I do, your Honor. Thank you.

12 THE COURT: Thank you, Mr. Schick.

13 MR. GUNTHER: Ladies and gentlemen, thank you. This
14 is my last chance to be before you and I promise I'll be brief.
15 We're coming into the homestretch here.

16 One thing that I want to cover -- I just want to cover
17 two things first.

18 There have been a number of statements by Mr. Schick
19 that New York City did not require signs. I showed you the
20 paragraph from the 2009 stipulation of settlement, the third
21 one, where they required the signs and where they required the
22 back rooms to be dismantled. You saw that. You can evaluate
23 that.

24 The other thing I'd want to just cover briefly is the
25 point -- he spent a lot of time on the notice point, the

J31VOME1

Rebuttal - Mr. Gunther

1 knowledge point. But he didn't read you what the judge is
2 going to instruct you on the knowledge point. Let me read that
3 to you now.

4 The second element of contributory trademark
5 infringement is whether the defendant had knowledge that
6 infringements of Omega's trademarks were being sold or offered
7 for sale at 375 Canal Street. Knowledge can be shown by
8 proving that 375 Canal had actual knowledge or reason to know
9 about the direct infringement of Omega's marks.

10 THE COURT: Mr. Gunther?

11 MR. GUNTHER: Yes, sir.

12 THE COURT: I'm going to read those instructions.

13 (Continued on next page)
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J31Wome2

Rebuttal - Mr. Gunther

1 MR. GUNTHER: Yes, sir.

2 There can be actual knowledge and there can be reason
3 to know, and the judge will instruct you and you'll hear that.

4 So what do we have in terms of notice, in terms of
5 knowledge? We do have Plaintiffs' Exhibit 90, Mr. Lindenbaum's
6 September 28, 2011, letter, and the second paragraph says, "As
7 you are already aware, in December 2010 and February 2011, the
8 New York City Police Department arrested certain individuals
9 for selling counterfeit versions of our clients' Omega and
10 Swatch-branded watches at a storefront retailer located at 375
11 Canal Street."

12 Now, I asked Mr. Laboz about that. I asked him about
13 that letter, and here are my questions:

14 "Q. And then, sir, were you aware of enforcement actions that
15 were taken by the New York Police Department that involved
16 raids at 375 Canal Street for counterfeit goods in December
17 2007?

18 "A. No.

19 "Q. Were you aware of a raid that took place on February 10,
20 2011, again, where people at 375 Canal Street were arrested for
21 selling Omega-branded watches?"

22 Then there's an objection. It's overruled, and he
23 says no.

24 "A. No. The first time I was aware is when I got this letter,
25 ten months after the raids."

J31Wome2

Rebuttal - Mr. Gunther

1 And this is the question I'd ask you to focus on.

2 "Q. Did you investigate to determine whether such raids had
3 occurred?

4 "A. I took it at face value.

5 "Q. You accepted it as true?

6 "A. I accepted it as true, absolutely."

7 The notion that he did not have notice, that 375 Canal
8 LLC did not have knowledge is refuted by his own testimony that
9 I just read to you.

10 Plaintiffs' Exhibit 91 further refutes that. That's
11 Ms. Tritto's response to Mr. Lindenbaum on October 3, 2011.
12 She says, "With respect, 375 Canal, apparently the tenant
13 sublet the space to an entity that was selling counterfeit
14 goods bearing your clients' trademarks."

15 They accept it. They accept it as true. We've proven
16 knowledge, and I'm not going to cover the other parts, because
17 I think I anticipated what Mr. Schick was going to say. You've
18 heard a lot of complaints from him. He complained that Omega
19 is making a federal case out of a single counterfeit watch.
20 Lots of efforts to blame Omega for not doing more. Lots of
21 efforts to point fingers at other people, so in conclusion, I'd
22 like to come back to something that Mr. Noyes said in his
23 opening statement.

24 This is not a case about just the sale of one Omega
25 watch, although everyone in this agrees that even the sale of a

J31Wome2

Rebuttal - Mr. Gunther

1 single counterfeit watch is wrong. This is a case about a
2 landlord, 375 Canal, owned by Albert Laboz and his brothers,
3 that for years has allowed 375 Canal Street to be a haven for
4 the sale of counterfeit goods, including counterfeit Omega
5 watches. We have cataloged that evidence for you, almost all
6 of which is not disputed by the defendant.

7 Now, most counterfeit cases settle because in each
8 individual case, it's about the sale of one Louis Vuitton
9 handbag or one Chanel necklace or one Rolex watch. Litigation
10 is expensive. Taking a case all the way to trial is expensive,
11 and it takes a long time. This case was filed in 2012, and
12 here we are in 2019. It's only come to trial now, seven years
13 later.

14 You can see just in this case there were at least four
15 lawsuits that were brought against 375 Canal that all ended in
16 settlements, three brought by the city of New York and the
17 fourth brought by Louis Vuitton. But you also saw what
18 happened after each of those settlements. Nothing changed.
19 The counterfeiting activity at 375 Canal Street continued. The
20 Laboz brothers chalked up the minor inconvenience of the
21 litigation to the cost of doing business. But Omega and The
22 Swatch Group decided not to settle this case. They decided to
23 invest the time and give us the resources to take this case to
24 trial, in the hope of breaking the endless cycle of
25 counterfeiting activity at 375 Canal Street and, hopefully, to

J31Wome2

Rebuttal - Mr. Gunther

1 send a broader message to the Laboz brothers and landlords in
2 the Canal Street area and even beyond that.

3 Well, I think we have the Laboz brothers' attention.
4 They're here, sitting at counsel table. They're all here
5 today. They're watching. They're listening, and I suppose
6 that's a good thing.

7 Now, as Mr. Schick has said, \$8 million is a lot of
8 money. He and I don't agree on almost anything, but we agree
9 on that. But if the Laboz brothers walk out of this courtroom
10 with a slap on the wrist, use your good judgment to think about
11 what lesson they will take from that. Will just go back to
12 business as usual, and will the cycle of counterfeiting
13 continue? But consider what an award of \$8 million might do to
14 change their behavior.

15 Maybe, just maybe, we'll get those anticounterfeiting
16 signs put up. Maybe, just maybe, we'll get those hidden
17 storerooms dismantled. Maybe, just maybe, we'll get the Laboz
18 brothers to take monitoring of their properties seriously.
19 Maybe, just maybe, other landlords will look at the verdict, at
20 this verdict, at your verdict, and do the same. Maybe, just
21 maybe, the endless cycle of counterfeiting will be broken. And
22 maybe, just maybe, your week of sacrifice, your week of
23 service, members of the jury, in this case will not have been
24 in vein and will have been worthwhile.

25 Thank you very much.

J31Wome2

Charge

1 THE COURT: We'll take another short recess. Then
2 I'll give you the instructions, we'll swear in the marshal and
3 you'll begin your deliberations. We'll take about five
4 minutes.

5 (Recess)

6 THE COURT: Please be seated.

7 I notice some of you have been taking notes. You
8 don't have to take notes, because I'm going to give you a copy
9 of the charge when you go into the jury room, so try to pay
10 attention to what I say; don't try to take notes now.

11 Members of the jury, you have now heard all of the
12 evidence in the case as well as the final arguments of the
13 parties. We have reached the point where you are about to
14 undertake your final function as jurors. You have paid careful
15 attention to the evidence, and I am confident that you will act
16 together with fairness and impartiality to reach a just verdict
17 in the case.

18 My duty at this point is to instruct you as to the
19 law. It is your duty to accept these instructions of law and
20 to apply them to the facts as you determine them, just as it
21 has been my duty to preside over the trial and to decide what
22 testimony and evidence was relevant, under the law, for your
23 consideration.

24 On these legal matters, you must take the law as I
25 give it to you. If any attorney has stated a legal principle

J31Wome2

Charge

1 different from any that I state to you in my instructions, it
2 is my instructions that you must follow. You must not
3 substitute your own notions or opinions of what the law is or
4 ought to be. As I told you at the beginning and reminded you
5 during the trial, you are not to infer from any of my questions
6 or my comments or any of my rulings on objections or anything
7 else I have done during this trial that I have any view as to
8 the credibility of the witnesses or how you should decide the
9 case. How you decide the case is strictly up to you.

10 As members of the jury, you are the sole and exclusive
11 judges of the facts. You review the evidence. You determine
12 the credibility of the witnesses. You resolve any conflicts in
13 the testimony. You draw reasonable inferences you decide to
14 draw from the facts as you have determined them, and you
15 determine the weight of the evidence. It is your sworn duty,
16 and you have taken the oath as jurors, to determine the facts
17 and to follow the law as I give it to you.

18 It is the duty of the attorneys to object when the
19 other side offers testimony or evidence that the attorney
20 believes is not properly admissible. Therefore, you should
21 draw no inference from the fact that an attorney raised an
22 objection. Nor should you draw any inference from the fact
23 that I sustained or overruled an objection.

24 From time to time, the lawyers and I have had sidebar
25 conferences and other conferences out of your hearing. These

J31Wome2

Charge

1 conferences involved procedural and other matters. You should
2 not take into account any of the events relating to these
3 conferences.

4 You are to evaluate the evidence calmly and
5 objectively, without prejudice or sympathy. You are to be
6 completely fair and impartial. Your verdict must be based
7 solely on the evidence developed at this trial, or the lack of
8 evidence. The parties in this case are entitled to a trial
9 free from prejudice and bias. Our judicial system cannot work
10 unless you reach your verdict through a fair and impartial
11 consideration of the evidence. All parties are entitled to the
12 same fair trial at your hands. They stand equal before the
13 law, and are to be dealt with as equals in this court.

14 Burden of proof.

15 In a civil case such as this, and unless I instruct
16 you otherwise, the plaintiff has the burden to prove all
17 elements of its claim by a preponderance of the evidence. What
18 does that mean? Establishing a fact by a preponderance of the
19 evidence means proving that the fact is more likely true than
20 not by the weight of the evidence. It refers to the quality
21 and persuasiveness of the evidence, not the number of witnesses
22 or documents. In determining whether a claim has been proven
23 by a preponderance of the evidence, you may consider the
24 relevant testimony of all witnesses, regardless of who may have
25 called them, and all the relevant exhibits received in

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1 evidence, regardless of who may have introduced them.

2 If, after considering all of the evidence, you are
3 satisfied that plaintiff has carried its burden on each element
4 of the claim for which it has the burden of proof, then you
5 must find in the plaintiffs' favor. The party with the burden
6 of proof needs no more than a preponderance of the evidence.
7 So long as you find that the scales tip, however slightly, in
8 favor of the plaintiff -- that what it claims is more likely
9 true than not -- then the element will have been proven by a
10 preponderance of the evidence.

11 If, however, you find that the evidence on a given
12 element is evenly divided between the parties or that the
13 evidence produced by the plaintiff is outweighed by evidence
14 against its claim, then you must decide that issue against
15 Omega and find for the defendant. That is because the party
16 bearing the burden of proof must prove that element by more
17 than a simple equality of evidence.

18 Remember what I said in the beginning about the scales
19 of justice. At the start of the trial, they are equally
20 balanced. The party with the burden of proof must make those
21 scales of justice tip in its favor, even if only slightly, if
22 it is to meet this burden of proof. If the scales have not
23 moved or tip in the opposite direction, then that party has not
24 met its burden of proof.

25 The evidence in this case includes the sworn testimony

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1 of the witnesses and the documents admitted into evidence. The
2 lawyers' questions are not evidence; rather, it is the
3 witnesses' answers to the questions that are evidence.

4 Testimony that has been stricken or excluded by me is
5 not evidence and may not be considered by you in rendering your
6 verdict. Arguments by lawyers are not evidence, because the
7 lawyers are not witnesses. Lawyers are not under oath; they do
8 not testify. The lawyers' opening statements and their
9 summations are intended to help you understand the evidence.
10 If, however, your recollection of facts differs from the
11 lawyers' statements, it is your recollection that controls.

12 Evidence also includes exhibits that have been
13 received into evidence. Exhibits marked only for
14 identification, but not admitted into evidence, are not
15 evidence. Nor are materials brought forth only to refresh a
16 witness's recollection. Finally, any statements that I may
17 have made during the trial do not constitute evidence. It is
18 for you alone to weigh the evidence and decide the facts based
19 on the testimony you have heard and the exhibits you have seen.

20 There are two types of evidence that you may properly
21 use in reaching your verdict. One type of evidence is direct
22 evidence. One kind of direct evidence is a witness's testimony
23 about something he knows by virtue of his own senses --
24 something the witness has seen, felt, touched or heard. Direct
25 evidence may also be in the form of an exhibit.

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1 The other type of evidence is circumstantial evidence.
2 Circumstantial evidence is evidence that tends to prove one
3 fact by proof of other facts. There is a simple example of
4 circumstantial evidence that is often used in this courthouse.

5 Assume that when you came into the courthouse this
6 morning, the sun was shining and it was a nice day. Assume
7 that the courtroom blinds are drawn and you cannot look
8 outside. As you are sitting here, someone walks in with an
9 umbrella that is dripping wet. Somebody else then walks in
10 with a raincoat that is also dripping wet.

11 Now, you cannot look outside the courtroom and you
12 cannot see whether or not it is raining. So you have no direct
13 evidence of that fact. But on the combination of the facts
14 that I have asked you to assume, it would be reasonable and
15 logical for you to conclude that between the time that you
16 arrived at the courthouse and the time these people walked in,
17 it had started to rain.

18 That is all there is to circumstantial evidence. You
19 infer on the basis of reason and experience and common sense
20 from an established fact the existence or nonexistence of some
21 other fact.

22 Many facts, such as a person's state of mind, can only
23 rarely be proved by direct evidence. Circumstantial evidence
24 is of no less value than direct evidence; the law makes no
25 distinction between direct and circumstantial evidence, but

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1 simply requires that you, the jury, decide the facts in
2 accordance with the preponderance of all the evidence, both
3 direct and circumstantial.

4 You have had the opportunity to observe witnesses. It
5 is now your job to decide how believable each witness was in
6 his or her testimony. You are the sole judges of the
7 credibility of each witness and of the importance of his or her
8 testimony. You should carefully scrutinize all of the
9 testimony of each witness, the circumstances under which each
10 witness testified, the impression the witness made when
11 testifying, and any other matter in evidence that may help you
12 decide the truth and the importance of each witness's
13 testimony. Was the witness candid, frank and forthright, or
14 did the witness seem to be evasive or suspect in some way? In
15 answering questions, did the witness volunteer more information
16 than asked? Was the witness telling the truth or trying to
17 sell you a bill of goods? Was the witness exaggerating or
18 telling it to you straight? How did the way the witness
19 testified on direct examination compare with how the witness
20 testified on cross-examination? In other words, what you must
21 try to do in deciding credibility is to size a witness up in
22 light of his or her demeanor, the explanations given and all of
23 the other evidence in the case. You should use your common
24 sense, your good judgment, and your everyday experience in life
25 to make your credibility determinations.

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1 In deciding whether to believe a witness, you may take
2 account of the fact that some of the witnesses are parties to
3 the lawsuit and may benefit in some way from the outcome of the
4 case. You may consider evidence of any other interest or
5 motive that the witness may have in cooperating with a
6 particular party.

7 Of course, the mere fact that a witness is interested
8 in the outcome of the case does not mean he or she has not told
9 the truth. It is for you to decide from your observations and
10 applying your common sense and experience and all the other
11 considerations mentioned whether the possible interest of any
12 witness or of any party has intentionally or otherwise colored
13 or distorted his testimony. You are not required to disbelieve
14 an interested witness; you may accept as much of the testimony
15 as you deem reliable and reject as much as you deem unworthy of
16 acceptance. In other words, what you must try to do in
17 deciding credibility is to size up a person just as you would
18 in any important matter where you are trying to decide if a
19 person is truthful, straightforward and accurate in his or her
20 recollection.

21 I have not expressed nor have I intended to intimate
22 any opinion as to which witnesses are or are not worthy of
23 belief, what facts are or are not established, or what
24 inference or inferences should be drawn from the evidence. If
25 any expression of mine has seemed to indicate an opinion

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1 relating to any of these matters, I instruct you to disregard
2 it. You are, I repeat, the exclusive, sole judges of all of
3 the questions of fact submitted to you and of the credibility
4 of the witnesses. Your authority, however, is not to be
5 exercised arbitrarily; it must be exercised with sincere
6 judgment, sound discretion, and in accordance with the rules of
7 law which I give you. In making your determination of the
8 facts, your judgment must be applied only to that which is
9 properly in evidence. Arguments of counsel are not in
10 evidence, although you may give consideration to those
11 arguments in making up your mind on what inferences to draw
12 from the facts which are in evidence.

13 Your verdict must be based solely upon the evidence,
14 or the lack of evidence, developed at trial and the
15 instructions I give to you on the law. It would be improper
16 for you to consider any personal feelings you may have about a
17 party's race, sex, ethnicity, national origin or disability.

18 The law does not require any party to call as
19 witnesses all persons who may have been present at any time or
20 place involved in the case, or who may appear to have some
21 knowledge of the matters in issue at the trial. Nor does the
22 law require any party to produce as exhibits all papers and
23 things mentioned in the evidence in the case. Your decision
24 must be based on the testimony and documents admitted into
25 evidence.

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1 You should consider and decide this case as a dispute
2 between persons of equal standing in the community, of equal
3 worth, and holding the same or similar station in life. A
4 corporation is entitled to the same fair trial as a private
5 individual. All persons, including corporations and other
6 organizations, stand equal before the law and are to be treated
7 as equals.

8 I'll turn now to the substantive law charges.

9 As you have heard throughout this trial, Omega asserts
10 that 375 Canal LLC, the owner and landlord of 375 Canal Street,
11 is liable for contributory trademark infringement and
12 counterfeiting of a number of Omega trademarks. For Omega to
13 prevail on its claim in this action, it must prove its claims
14 by a preponderance of the evidence. I will refer to the
15 defendant 375 Canal LLC as 375 Canal. I will refer to the
16 address of the storefront at issue in this case as 375 Canal
17 Street.

18 Omega seeks damages against 375 Canal for contributory
19 trademark infringement. To help you understand the evidence
20 presented in the case, I will explain some of the legal terms
21 you have heard during this trial.

22 As I explained in my instructions to you at the
23 beginning of the trial, a trademark is any word, name, symbol,
24 device, or any combination thereof, used by a person or company
25 to identify and distinguish that person's goods from those sold

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1 by others and to indicate that the owner is the source of the
2 goods. The main function of a trademark is to identify and
3 distinguish the product of a particular merchant and to protect
4 its goodwill against the sale of another's product as its own.

5 The trademark laws balance three often-conflicting
6 goals: (1) protecting the public from being misled about the
7 nature and source of goods and services, so that the consumer
8 is not confused or misled in the market; (2) protecting the
9 rights of a business to identify itself to the public and its
10 reputation in offering goods and services to the public; and
11 (3) protecting the public interest in fair competition in the
12 market.

13 The law entitles the owner of a trademark to exclude
14 others from using that trademark without its permission. The
15 unauthorized use of a trademark is called "infringement" of the
16 trademark if the use of the mark in commerce creates a
17 likelihood of confusion, mistake, or deception as to the
18 source, affiliation, or sponsorship of the goods. The owner of
19 a trademark may enforce the right to exclude its use by others
20 in an action for trademark infringement.

21 Because Omega owns federal registrations for its
22 trademarks, all persons are deemed to have knowledge of these
23 registrations and of the rights claimed in the registrations.
24 Omega, as the holders of registered trademarks, can bring a
25 trademark infringement claim against any person who, without

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1 Omega's consent (1) uses any reproduction, counterfeit, copy or
2 colorable imitation of one of its registered marks; (2) in
3 commerce; (3) in connection with the sale, offering for sale,
4 distribution, or advertising of any goods or services; (4)
5 where such use is likely to cause confusion, or to cause
6 mistake, or to deceive as to the source, origin, affiliation,
7 approval, or sponsorship of Omega's goods.

8 The distribution, sale, or offer for sale of goods
9 bearing a counterfeit trademark is a form of trademark
10 infringement referred to as "counterfeiting." Omega contends
11 that the watch at issue here contained counterfeits of the
12 trademarks. A counterfeit trademark or counterfeit mark is a
13 nongenuine or unauthorized trademark that, to an average
14 observer, is identical to, or substantially indistinguishable
15 from, a registered trademark. A mark is "substantially
16 indistinguishable" if it contains only minor differences from
17 the registered trademark that may be apparent upon close
18 inspection but would not necessarily be obvious to an average
19 observer.

20 Omega does not allege that 375 Canal directly sold or
21 offered for sale watches containing counterfeit Omega
22 trademarks. Omega's claim against 375 Canal is for what the
23 law calls contributory trademark infringement. Omega contends
24 that the defendant, through its actions or inactions,
25 contributed to or facilitated the sale or offering for sale of

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1 watches containing counterfeit Omega trademarks.

2 Before I instruct you on what Omega has to have shown
3 in this case to prove contributory trademark infringement, I
4 want to clarify something that came up during the trial. You
5 may have heard suggestion that Omega should have brought an
6 action against particular individuals for direct infringement
7 instead of against 375 Canal LLC for contributory infringement.
8 I'm instructing you that the law does not require a party to
9 bring an action against any direct infringer in order to
10 succeed in a claim of contributory trademark infringement.
11 Accordingly, when determining whether 375 Canal LLC is liable
12 for contributory infringement in this case, please disregard
13 whether plaintiffs tried and/or succeeded in pursuing an action
14 against individual trademark infringers, such as those who
15 manufactured, distributed or sold infringing goods.

16 In considering Omega's claims, you must first consider
17 whether defendant's tenants, subtenants, or occupants of 375
18 Canal Street infringed Omega's trademarks. That is, you must
19 determine by a preponderance of the evidence: (1) whether
20 goods were sold or offered for sale from 375 Canal or by one or
21 more tenant, subtenant or occupant at 375 Canal Street; (2)
22 that those goods contained a word, symbol or other designation;
23 (3) that, to an average observer, was likely to cause
24 confusion, or cause mistake, or to deceive as to the source,
25 origin, affiliation, approval, or sponsorship of the goods.

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1 "source," "origin," "affiliation," "approval," or "sponsorship"
2 means that the public believes that the merchandise sold by the
3 vendors comes from, are affiliated with, are approved by, or
4 sponsored by Omega.

5 For trademark infringement, it is not necessary that
6 the word, symbol, or other designation on the goods sold or
7 offered for sale be an exact copy of Omega's trademark. It is
8 enough that the word, symbol, or other designation on the goods
9 sold or offered for sale is likely to cause consumer confusion
10 about the source, origin, affiliation, approval or sponsorship
11 of the goods.

12 In determining whether a particular good is likely to
13 cause confusion regarding its source, you may draw on your
14 common experience as citizens of the community. Likelihood of
15 confusion is also determined by evaluating the following
16 factors:

17 First, the distinctiveness or strength of the
18 trademarks that Omega alleges were infringed. The more the
19 consuming public recognizes Omega's trademark as an indication
20 of origin of Omega's goods, the more likely it is that
21 consumers would be confused about the source of goods that use
22 a similar mark;

23 Second, the degree of similarity between the words,
24 symbols or designations on the goods sold or offered for sale
25 at 375 Canal Street and Omega's trademarks;

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1 Third, the degree or similarity between the type of
2 goods sold by Omega under its trademarks and the type of goods
3 sold or offered for sale at 375 Canal Street containing similar
4 marks. If Omega and the sellers of goods at 375 Canal Street
5 use the marks on the same, related or complimentary kinds of
6 goods, there may be a greater likelihood of confusion;

7 Fourth, the existence of actual confusion;

8 Fifth, the intent of the sellers of goods at 375 Canal
9 Street;

10 Sixth, the quality of the defendant's products; and

11 Seventh, the sophistication of the purchasers.

12 No one factor or consideration is conclusive, but each
13 should be weighed in light of the total evidence presented at
14 the trial. In light of these considerations and your common
15 experience, you must determine if ordinary consumers, neither
16 overly careless nor overly careful, would be, upon encountering
17 the items sold at 375 Canal Street, confused about the source,
18 sponsorship, approval or affiliation of the parties' products.

19 Counterfeit marks, by their very nature, cause
20 confusion. So if you find that the goods sold or offered for
21 sale from 375 Canal Street contained counterfeit marks -- in
22 other words, a word, symbol or other designation that, to an
23 average observer, was identical to, or substantially
24 indistinguishable from, Omega's trademarks -- then you do not
25 need to separately determine whether there is a likelihood of

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1 confusion. A counterfeit mark is a mark that infringes a
2 trademark.

3 If you find infringement of any of Omega's trademarks,
4 you must then consider whether 375 Canal is contributorily
5 liable for that trademark infringement. That is, you must
6 determine each of four elements by a preponderance of the
7 evidence. I am going to describe each of the four elements
8 first and will then provide further explanation on each.

9 First whether defendant possessed the power and
10 authority to exercise control over the use of the premises at
11 375 Canal Street for selling or offering for sale merchandise
12 that infringed Omega's trademarks;

13 Second, whether defendant knew or had reason to know
14 that merchandise that infringed Omega's trademarks was being
15 sold or offered for sale at 375 Canal Street;

16 Third, whether defendant continued to lease its
17 premises at 375 Canal Street even after it knew or had reason
18 to know that the premises were being used as a place from which
19 merchandise that infringed Omega's trademarks was sold or
20 offered for sale; and

21 Fourth, whether defendant took reasonable remedial
22 steps to try to stop the sale or offer for sale of merchandise
23 that infringed Omega's trademarks at 375 Canal Street.

24 As I stated, the first element of contributory
25 trademark infringement is whether 375 Canal possessed the power

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1 and authority to exercise control over the use of the premises
2 at 375 Canal Street for selling or offering for sale
3 merchandise that infringed Omega's trademarks.

4 This element may be satisfied by Omega showing that
5 375 Canal possessed the right, ability or authority either (i)
6 to control the use of the physical retail space that it rented
7 at 375 Canal Street, or (ii) to control the activities that any
8 of 375 Canal Street's tenants could engage in while occupying
9 such space at 375 Canal Street.

10 Omega may establish that 375 Canal controlled these
11 premises by showing that it possessed the necessary power or
12 authority to restrict, through provisions in the lease
13 agreements, or by pointing to rules and regulations in the
14 lease agreements regarding the activities in which tenants,
15 subtenants or occupants were permitted to engage in at the 375
16 Canal Street address. For this element, the issue is only
17 whether 375 Canal possessed such power and authority, not
18 whether it chose to exercise that power and authority in any
19 particular case.

20 Even if 375 Canal has control over the premises, 375
21 Canal has no affirmative duty to take precautions against the
22 sale of counterfeit goods or to seek out and prevent alleged
23 trademark violations, and cannot be found liable if it simply
24 fails to take reasonable preemptive precautions against sales
25 of counterfeit items. As explained above and below, however,

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1 375 Canal may be contributorily liable for infringement if it
2 continues to supply its services after 375 Canal either knew or
3 had reason to know that a tenant, subtenant or other occupant
4 of its premises was selling, offering for sale, or distributing
5 products bearing counterfeits of Omega's trademarks.

6 The second element of contributory trademark
7 infringement is whether defendant had knowledge that
8 infringements of Omega's trademarks were being sold or offered
9 for sale at 375 Canal Street. Knowledge can be shown by
10 proving that 375 Canal had actual knowledge or reason to know
11 about the direct infringement of Omega's trademarks.

12 Actual knowledge means 375 Canal or its agents
13 possessed specific knowledge that one or more tenants,
14 subtenants or occupants were selling merchandise that infringed
15 Omega's trademarks at 375 Canal Street.

16 Reason to know means that a reasonably prudent owner,
17 manager, landlord or their agents would or should have known of
18 the sale or offer for sale of merchandise that infringed
19 Omega's trademarks at 375 Canal Street by tenants, subtenants
20 or occupants of the premises. It also includes a concept known
21 as willful blindness. Willful blindness means that 375 Canal
22 or its agents had reason to suspect that trademark infringing
23 merchandise was being offered or sold but deliberately failed
24 to investigate or looked the other way to avoid seeing such
25 activity. Willful blindness asks what 375 Canal or its agents

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1 suspected and what they did with such suspicion. Thus, 375
2 Canal can be found liable for contributory trademark
3 infringement if it or its agents suspected wrongdoing was
4 occurring at 375 Canal Street and deliberately failed to
5 investigate.

6 In determining the scope of 375 Canal's knowledge, you
7 may consider the nature and extent of the communication between
8 375 Canal and its tenants, subtenants or other occupants of the
9 premises regarding the infringing acts. You may also consider
10 the extent and nature of the alleged infringement of Omega's
11 trademarks. If the infringement is serious and widespread, it
12 is more likely that 375 Canal knew about and condoned the acts
13 of its tenants, subtenants or other occupants of its premises.
14 Conversely, if the infringement is limited, it is less likely
15 that 375 Canal knew about and condoned the infringement of
16 Omega's marks.

17 As I stated, the third element of contributory
18 trademark infringement is whether 375 Canal continued to lease
19 its premises at 375 Canal Street even after it knew or had
20 reason to know that the premises were being used as a place
21 from which merchandise that infringed Omega's trademarks was
22 sold or offered for sale.

23 Even if 375 Canal took action to remove a particular
24 occupant from the premises, you may find that this element is
25 satisfied if 375 Canal continued to make the premises available

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1 to other occupants whose infringing activities it knew of or
2 had reason to know of.

3 As I stated, the fourth element of contributory
4 trademark infringement is whether, considering the facts
5 specific to this case, 375 Canal took reasonable remedial steps
6 to try to stop the sale or offer for sale of merchandise that
7 infringed Omega's trademarks at 375 Canal Street. You must
8 decide whether 375 Canal had knowledge of the infringing
9 activity at its premises, and whether it failed to take
10 reasonable steps to halt this infringing activity.

11 If you find that 375 Canal is liable for contributory
12 trademark infringement, then you must determine Omega's
13 damages. Omega seeks what is known as an award of statutory
14 damages. Statutory damages are damages established by
15 Congress. The purpose of statutory damages is to compensate
16 the trademark owner, penalize the defendant, and deter future
17 trademark counterfeiting.

18 Under federal trademark infringement laws, Omega is
19 entitled to recover an award of statutory damages for each of
20 its trademarks that was counterfeited. Section 35(c) of the
21 trademark act provides that plaintiff may elect to recover an
22 award of statutory damages in the amount of:

23 (1) not less than \$1,000 or more than \$200,000 per
24 counterfeit mark per type of good sold, offered for sale, or
25 distributed; or

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1 (2) if you find that 375 Canal's conduct was
2 "willful," you may award statutory damages up to \$2 million per
3 counterfeit mark per type of good sold, offered for sale, or
4 distributed.

5 To prove willfulness, Omega must show (1) that 375
6 Canal was actually aware of the infringing activity; or (2)
7 that 375 Canal's actions were the result of reckless disregard
8 or willful blindness. The fact that 375 Canal did not directly
9 sell or offer for sale counterfeit Omega watches does not
10 prevent you from finding that 375 Canal's acts of contributory
11 trademark infringement were willful. Similarly, whether or not
12 the direct infringer acted willfully has no bearing on whether
13 375 Canal acted willfully.

14 In determining the amount of statutory damages, you
15 may select an amount as you consider just based upon the facts
16 and circumstances of this case, and you may consider a number
17 of factors, including, but not limited to, (1) the profits
18 realized by the defendant as a result of the infringing
19 activity; (2) the revenues lost by Omega; (3) the value of the
20 trademark; (4) the deterrent effect on others besides the
21 defendant; (5) whether the defendant's conduct was innocent or
22 willful; (6) whether a defendant has cooperated in providing
23 particular records from which to assess the value of the
24 infringing material produced; and (7) the potential for
25 discouraging the defendant.

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1 There is no necessary mathematical relationship
2 between the size of a statutory damages award and any profits
3 made by defendant or damage suffered by plaintiffs. Statutory
4 damages may still be awarded even if Omega did not lose revenue
5 or suffer any actual damages.

6 Ladies and gentlemen of the jury, that concludes my
7 instructions to you. You are about to go into the jury room to
8 begin your deliberations. I am going to designate juror No. 1
9 as your foreperson. Ms. Burns will preside over your
10 deliberations and serve as your spokesperson if you need to
11 communicate with the Court. I send the exhibits into the jury
12 room along with the jury charge and verdict sheet. If you want
13 any of the trial testimony read, please send out a note
14 specifying what you want to hear, and we will bring you back to
15 the courtroom to read it back for you. Please be as specific
16 as you possibly can in requesting a read back of the trial
17 testimony. If you want any further explanation of the law as I
18 have explained it to you, you may also request that.

19 All communications with the Court should be made to me
20 in writing, signed by your foreperson, Ms. Burns, and given to
21 the court officer. In any event, do not tell me or anyone else
22 how the jury stands on any issue until after a verdict is
23 reached.

24 Some of you may have taken notes during this trial.
25 Remember what I said to you. Your notes are simply an aid to

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1 memory. Notes that any of you may have made may not be given
2 any greater weight or influence in determination of the case
3 than the recollections or impressions of other jurors, whether
4 from notes or memory, with respect to the evidence presented or
5 what conclusions, if any, should be drawn from such evidence.
6 Any difference between a juror's recollection and another
7 juror's notes should be settled by asking to have the court
8 reporter read back the transcript, for it is the court record
9 rather than any juror's notes upon which the jury must base its
10 determination of the facts and its verdict.

11 You will now retire to decide the case. To prevail,
12 Omega must sustain its burden of proof as I have explained it
13 to you with respect to each element of its claim. If you find
14 that Omega has succeeded, you must return a verdict in its
15 favor. If you find that Omega has not, then your verdict must
16 be for the defendant.

17 It is your duty as jurors to consult with one another
18 and to deliberate with a view to reaching an agreement. Each
19 of you must decide the case for himself or herself, but you
20 should do so only after a consideration of the case with your
21 fellow juror, and you should not hesitate to change an opinion
22 when convinced that it is erroneous. Your verdict must be
23 unanimous, but you are not bound to surrender your honest
24 convictions concerning the effect or weight of the evidence for
25 the mere purpose of returning a verdict solely because of the

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1 opinion of other jurors. Discuss and weigh your respective
2 opinions dispassionately, without regard to sympathy, without
3 regard to prejudice or favor for either party, and adopt that
4 conclusion which in your conscience appears to be in accordance
5 with the truth.

6 Again, each of you must make your own decision about
7 the proper outcome of this case based on your consideration of
8 the evidence and your discussions with your fellow jurors. No
9 juror should surrender his or her conscientious beliefs solely
10 for the purpose of returning a unanimous verdict.

11 I have prepared a special verdict sheet for you to use
12 in recording your decisions. The form contains eight
13 questions, although, depending on your answers, you may or may
14 not need to answer all eight. You should proceed through the
15 questions on the special verdict sheet in the order in which
16 they are listed and follow the instructions provided.

17 Finally, Ms. Burns, the foreperson, will send out any
18 notes, and when the jury has reached a verdict, she will notify
19 the court officer that the jury has reached a verdict, and you
20 will come into open court and give the verdict.

21 After you have reached a verdict, your foreperson will
22 fill in the form that has been given to you, sign and date it,
23 and advise the court officer outside your door that you are
24 ready to return to the courtroom. I stress that each of you
25 must be in agreement with the verdict that is announced in

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1 court.

2 Members of the jury, that concludes my instructions to
3 you. I will ask you to remain seated while I confer with the
4 attorneys to see if there are any additional instructions that
5 they would like to have me give to you or anything I may not
6 have covered in my previous instruction or if I've misstated
7 the law in any way. I ask you not to discuss the case while
8 seated in the box, because the case has not yet been formally
9 submitted to you.

10 One formal point. We've been breaking at 2:30. Would
11 you please send out a note, after conferring among yourselves,
12 and let us know what your schedule is for deliberations. If
13 you can reach a verdict today, fine. If you can't, you have to
14 come back on Monday. Tell us what time you're coming back on
15 Monday, but you can't deliberate unless all of you are present.
16 So agree upon a time. We'll make sure that the courtroom is
17 open and the jury room is open too and the court officer will
18 be here to assist you.

19 I'll take a short break here.

20 Can I see counsel.

21 (At sidebar)

22 THE COURT: Any objections?

23 MR. GUNTHER: No, your Honor. As read, we have no
24 further objections.

25 THE COURT: Mr. Della Fera.

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1 MR. DELLA FERA: One point, your Honor, I know I
2 raised this yesterday, "continued to lease the premises," and
3 the issue I'm going to raise today is we think that maybe the
4 word "lease" specifically is misleading; you don't necessarily
5 lease to a subtenant. So "provide space" or something like
6 that might clarify.

7 THE COURT: You want a supplement to what I've read?

8 MR. DELLA FERA: Yes.

9 MR. SCHICK: Evict the tenant as opposed to the
10 subtenant.

11 MR. DELLA FERA: We understand the additional
12 instruction that your Honor had, that if they evict one and
13 there is still another about whom they had knowledge, that that
14 still continues.

15 THE COURT: The objection's overruled.

16 (In open court)

17 THE COURT: Swear the marshal, please.

18 THE DEPUTY CLERK: Marshal, please come to the front.
19 Please raise your right hand.

20 (Marshal sworn)

21 THE COURT: We'll send in the exhibits. We'll send in
22 a jury charge for each one of you and one copy of the verdict
23 form.

24 Thank you very much.

25 (At 12:17 p.m., the jury retired to deliberate)

J31Wome2

1 THE COURT: Leave your cell phone numbers.

2 MR. GUNTHER: Your Honor, do you want us to stay in
3 the court area?

4 THE COURT: Oh, yes, especially today, because I
5 believe that they're not going to deliberate beyond 2:30, at
6 least based on what we learned yesterday.

7 MR. GUNTHER: We totally understand that, your Honor.

8 THE COURT: Stay close by.

9 MR. GUNTHER: We'll stay close by.

10 THE COURT: And I think we ought to get a note soon
11 from the jury letting us know what the deliberation schedule is
12 going to be.

13 MR. GUNTHER: Thank you, your Honor.

14 (Recess pending verdict)

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1 (Jury present)

2 THE COURT: We have your note. I guess you're going
3 to go home and resume your deliberations at 10 o'clock on
4 Monday morning; is that correct?

5 THE JURY: Yes, your Honor.

6 THE COURT: Now, don't take any of the notes that
7 you've taken, any of the jury charge; leave those here.

8 Keep your minds open. Don't talk about the case.

9 When all seven of you arrive on Monday, whatever time
10 you agree to, that's when you can begin your deliberations. If
11 anybody is missing, you can't start till everybody is there.

12 All right?

13 THE JURY: Okay.

14 THE COURT: Have a nice weekend.

15 THE JURY: Thank you, your Honor.

16 THE COURT: See you on Monday.

17 (Jury not present)

18 THE COURT: Anything to take up?

19 MR. GUNTHER: Your Honor, just one thing.

20 I have an unavoidable trip that I have to make out of
21 town next week. But Mr. Noyes and Ms. Gostin will be here and
22 will be able to take care of things in my absence, if that's
23 okay with your Honor.

24 THE COURT: That's all right with me.

25 MR. GUNTHER: Thank you, your Honor.

J31VOME3

1 THE COURT: If it's all right with Mr. Noyes.
2 MR. NOYES: Yes, it is. Thank you.
3 THE COURT: Anything from you, Mr. Schick?
4 MR. SCHICK: I will unavoidably be here, your Honor.
5 THE COURT: Okay. All right.
6 Everybody have a nice weekend.
7 MR. GUNTHER: You too, your Honor. Thank you.
8 MR. SCHICK: Thank you.
9 (Adjourned to March 4, 2019 at 10 o'clock a.m.)
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